United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR PETITIONERS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

407

No. 21,820

AUTOMOTIVE PARTS & ACCESSORIES, INC.,

Petitioner,

v.

ALAN S. BOYD, *et al.*,

Respondents,

AUTOMOTIVE SERVICE INDUSTRY ASSOCIATION,

Intervenor.

No. 22,015

STERLING PRODUCTS CO., INC.,

Petitioner,

v.

ALAN S. BOYD, *et al.*,

Respondents.

Petitions for Review of Order under
National Traffic and Motor Vehicle Safety Act
(15 U.S.C., §1381, *et seq.*)

Milton Eisenberg
1700 K Street, N. W.
Washington, D. C. 20006
Attorney for Petitioners

Of Counsel:
STRASSER, SPIEGELBERG, FRIED,
FRANK & KAMPELMAN
JAMES B. BLINKOFF

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER RESPONDENTS, IN ESTABLISHING FEDERAL MOTOR VEHICLE SAFETY STANDARD NO. 202 REQUIRING HEAD RESTRAINTS TO BE FACTORY INSTALLED ON ALL NEW CARS MANUFACTURED AFTER JANUARY 1, 1969, WERE REQUIRED TO ACT ON THE BASIS OF A RECORD AFTER OPPORTUNITY FOR AGENCY HEARING?

II. WHETHER RESPONDENTS IN ESTABLISHING STANDARD NO. 202 COULD DISREGARD PROVISIONS IN THE NATIONAL TRAFFIC AND MOTOR VEHICLE SAFETY ACT REQUIRING THAT THE ACT BE CARRIED OUT THROUGH THE NATIONAL TRAFFIC SAFETY BUREAU AND THAT STANDARDS BE ISSUED AFTER CONSULTATION WITH THE VEHICLE EQUIPMENT SAFETY COMMISSION AND A PROPERLY CONSTITUTED NATIONAL MOTOR VEHICLE SAFETY ADVISORY COUNCIL?

III. WHETHER STANDARD NO. 202 IS INVALID BECAUSE OF RESPONDENTS' FAILURE TO MAKE FINDINGS SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD TO SHOW THAT THE ORDER COMPLIED WITH THE CRITERIA AND LIMITATIONS SET FORTH IN THE NATIONAL TRAFFIC AND MOTOR VEHICLE SAFETY ACT?

IV. WHETHER RESPONDENTS ACTED ARBITRARILY IN DENYING PETITIONS FOR RECONSIDERATION ON GROUNDS NOT SUPPORTED BY THE RECORD OF THE PROCEEDINGS BEFORE THE AGENCY AND CONTRARY TO THE PROVISIONS OF THE NATIONAL TRAFFIC AND MOTOR VEHICLE SAFETY ACT?

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BRIEF FOR PETITIONERS

JURISDICTIONAL STATEMENT

Petitioner Automotive Parts & Accessories Association, Inc. (the "APAA"), is a national trade association consisting of independent automotive retailers, chains, distributors and manufacturers of automotive equipment, parts and accessories, including

head restraint devices of the type covered by the order sought to be reviewed and other items of motor vehicle safety equipment. It is duly incorporated as a non-profit corporation under the laws of the State of Illinois and has its principal place of business in the District of Columbia within this judicial circuit.

Petitioner Sterling Products Company, Inc. is a corporation duly incorporated under the laws of the State of Minnesota, engaged in the manufacture, sale and distribution of head restraint devices of the type covered by the order sought to be reviewed.

Petitioners were parties to the administrative proceedings leading to the establishment of the order and have exhausted their administrative remedies. Petitioners are adversely affected by the order and there is an actual controversy as to its validity.

Petitioner Automotive Parts and Accessories Association, Inc. initiated this proceeding for review by the filing of a timely Petition for Review in this Court. Thereafter, Petitioner Sterling Products Company, Inc. filed a Petition for Review of the same order in the United States Court of Appeals for the Eighth Circuit (No. 19,283) and the proceedings therein were ordered transferred to this Court under the provisions of 28 U.S.C., §2112 and consolidated. This Court has jurisdiction of the proceedings under the provisions of section 105 of the National Traffic & Motor Vehicle Safety Act (15 U.S.C., §1394) and section 10 of the Administrative Procedure Act (5 U.S.C., §§702-706).

STATEMENT OF THE CASE

The Promulgation Proceedings

On January 31, 1967, Respondent Lowell K. Bridwell, then Acting Under Secretary of Commerce for Transportation, issued an Advance Notice of Proposed Rule Making stating that the agency was considering issuance of a proposed motor vehicle

safety standard on head restraints (32 Fed. Reg. 2417; R. 1036) Prior thereto, a proposed standard for head restraints had been included in a group of 23 proposed Initial Standards in a Notice of Rule Making Proposing Initial Standards issued on November 30, 1966. (31 Fed. Reg. 15212; R. 1022) However, standards for head restraints (and two other proposed standards in the original group of 23) were not promulgated as Initial Standards because, as the Advance Notice of Proposed Rule Making explained, of a "lack of complete and sufficient reliable information on the subject matters of these standards and in order to take into consideration new technical or medical information that has become available." The Advance Notice stated that it "is issued to pursue these matters further" and that "it supersedes the proposals relating to these standards in Notice No. 1."

The January 31, 1967 Advance Notice of Proposed Rule Making solicited comments "on safety performance requirements [for head restraints] that are both reasonable and practicable and provide an adequate level of safety performance." It also invited persons commenting to direct their attention to the possibility of amending several specifically identified standards "so as to incorporate head restraint requirements within a single unified system of occupant seating and restraint arrangements." It further requested that "attention be directed to the problem of manufacturers being able to produce enough head restraints to meet the demand that would be created by adoption of a proposed standard."

On December 22, 1967, the Respondent Lowell K. Bridwell, as Federal Highway Administrator, issued a formal Notice of Proposed Rule Making stating that the Federal Highway Administration was considering several new standards and amendments to certain of the Initial Federal Motor Vehicle Safety Standards issued on January 31, 1967, including a new standard for head restraints. (32 Fed. Reg. 20865; R. 1042) The text of a proposed head restraint standard was set forth in the Notice.

On February 12, 1968, the Federal Highway Administrator issued "Motor Vehicle Safety Standard No. 202, Head Restraints — Passenger Cars." (33 Fed. Reg. 2945, *et seq.*; R. 1046) The Administrator did not make any findings or make any reference

to any evidence or record on which the standard may have been based. He did not discuss the comments solicited in the Advance Notice of Proposed Rule Making "on safety performance requirements that are both reasonable and practicable and provide an adequate level of safety performance" or the "complete and sufficient reliable information" or the "new technical or medical information," if any, on which the standard may have been based. Furthermore, the standard issued, like the standard proposed, did not "incorporate head restraint requirements within a single unified system of occupant seating and restraint arrangements," as was suggested in the Advance Notice of Proposed Rule Making. The only discussion in regard to the standard consists of brief references to "several comments" with regard to the proposed standard. For example, the Administrator, in a possible allusion to "the problem of manufacturers being able to produce enough head restraints to meet the demand that would be created by adoption of a proposed standard," states that "some comments claimed that lead time would be a problem; however, the Administration believes that the need to protect the public from neck injury outweighs the possible lead time problems."

On February 26, 1968, Petitioners filed a timely petition for reconsideration of the standard issued by the Administrator. (R. 932-35) On April 10, 1968, the last day allowed by the statute, Petitioners filed the petitions for judicial review now before the Court. On April 11, 1968, the Administrator issued amendments to the "demonstration procedures" in Federal Motor Vehicle Safety Standard No. 202, but made no reference to the petitions for reconsideration filed by Petitioners. (33 Fed. Reg. 5793; R. 1048) Finally, on May 20, 1968, the Administrator, by letter, rejected the petitions for reconsideration which had been filed in February by Petitioners. (R. 1225-27)

Petitioners' Position in the Promulgation Proceedings

Petitioners appeared and participated in the administrative proceedings and submitted several written comments with regard to the proposed head restraint standard.

On November 20, 1967, Petitioners expressed their concern with any provision in the head restraint standard that would require head restraints to be factory installed by new car manufacturers. (R. 489-92) They pointed out that "members of the automotive after-market industry have produced millions of head restraints for sale to new and used car buyers without prodding from the Federal Government"; that "such companies are in a position to adapt their production to any Federal safety standard which may be promulgated"; and that "experience suggests that they can supply such equipment to consumers more promptly and at less cost than the new car manufacturers."

In the same comment, Petitioners also pointed out that "the installation of head restraints is a relatively simple and inexpensive matter and there is no compelling reason for requiring that this item of equipment be factory installed." They further contended that "any possible ease in enforcement from requiring Federal standards to be factory implemented may be more apparent than real and, in any event, cannot be the sole basis for the agency's action." Specifically, Petitioners urged that "consideration must also be given in implementing the Federal safety program to such important questions as whether action will encourage further improvement and innovation, whether it will enlarge or restrict consumer choice, whether it will expedite or delay implementation of needed changes and the utilization of available technology, whether it will keep increased costs and prices to a minimum, and whether it will promote or curb competition."

Petitioners also pointed out that "the composition of the agency's advisory councils may be partly responsible for the lack of attention which has been given to this problem," and noted the lack of representation of motor vehicle equipment manufacturers

on the National Motor Vehicle Safety Council, although such representation is required by the National Traffic & Motor Vehicle Safety Act.

Subsequently, counsel for Petitioners met with the respondent Dr. William Haddon, Jr., Director of the National Traffic & Safety Bureau. Following this meeting, Petitioners submitted an additional comment outlining possible methods for implementing Federal safety standards other than by requiring auto manufacturers to include as original factory equipment the specific items covered. The additional comment, dated January 22, 1968, recognized that there may be some instances in which the agency may conclude that a particular safety standard, because of its nature, will require incorporation in the manufacture of the motor vehicle. (R. 484-88) It stressed, however, that any such conclusion "must be based upon evidence and findings and not upon conjecture or assumptions" and urged that "the burden of proof in every case should be borne by those who would restrict consumer choice, discourage further improvement and innovation, delay implementation of needed changes, increase prices, and curb competition."

Petitioners again criticized the proposed requirement that all head restraints be factory installed by new car manufacturers and the postponement of the effective date of the standard until at least January 1, 1969. "The inevitable result of such procedures," Petitioners stated, "will be to encourage production of head restraints under the minimum performance standards specified in the proposed rule, to deprive consumers of any choice of equipment, to impose upon consumers higher prices than would be charged in a competitive market, and to discourage any further improvement or innovation." It was also noted in this comment that because of the method proposed by the agency for its implementation, the proposed head restraint standard would give little or no protection to an unusually tall driver or passenger and "yet, such consumers would have no choice but to pay for the equipment installed at the factory on the basis of average heights."

One alternative suggested by Petitioners to factory installation of safety equipment by new car manufacturers would be "to permit consumers to select the particular head restraint which best suits their needs from among competing brands certified to be in compliance with Federal standards." It was shown that such a procedure was authorized under the provisions of the Act and would permit much earlier implementation of the proposed standard. It was explained that such a procedure had ample precedent and could be carried out in much the same manner employed in installing other mandatory automotive equipment such as tires, engines, body styles and even colors, as to which the new car manufacturers and dealers offer a variety of choices.

The Administrator, in a statement accompanying the issuance of Federal Motor Vehicle Safety Standard No. 202, rejected Petitioners' submissions with this comment: "The Administration has determined that safety dictates that head restraints be provided on all passenger cars manufactured on or after January 1, 1969, and that a head restraint standard that merely specified performance requirements for head restraint equipment would not insure that all passenger cars would be so equipped, and would not, therefore, meet the need for safety. Furthermore, the Administration has determined that the performance of a head restraint is dependent upon the strength of the structure of the seat to which it is attached, as well as the compatibility of the head restraints with its anchorage to the seat structure." (33 Fed. Reg. 2945; R. 1046)

On February 26, 1968, Petitioners filed a Petition for Reconsideration. (R. 932-935) The Petition for Reconsideration urged that the effective date of the standard be no later than June 1, 1968 (rather than January 1, 1969 as proposed); that the requirement of factory installation be deleted, and that the public be permitted to "designate for installation any head restraint certified to be in compliance with the standard." The Petition for Reconsideration reiterated the contention that the procedures for implementing Standard No. 202 would unreasonably delay the effective date of the standard, increase costs to consumers, restrict consumer choice, inhibit innovation and improvement, discourage competition, aggravate existing monopolistic

conditions in the automotive industry, and not adequately protect the public. It pointed out that there was no basis in the record for the requirement of factory installation of head restraints on all passenger cars manufactured after January 1, 1969 or for the Administrator's statement that factory installation was necessary because the "performance of a head restraint is dependent upon the strength of the structure of the seat to which it is attached and the compatibility of the head restraint with the anchorage to the seat structure." It also pointed out that the standard specified "design" rather than "performance" criteria, contrary to the express provisions of the Act. Finally, it again noted that the National Motor Vehicle Safety Advisory Council, with which the Secretary must consult on motor vehicle safety standards, did not include representatives of motor vehicle equipment manufacturers as required by the Act.

On May 20, 1968, the Administrator denied the Petition for Reconsideration. (R. 1225-27)

STATUTES INVOLVED

The statutes, orders, rules and regulations involved are set forth in an Appendix to this brief.

STATEMENT OF POINTS

1. Respondents erred in failing to comply with the provisions of the Administrative Procedure Act applicable to agency decisions which must be based on the agency's record after an opportunity for agency hearing.

2. Respondents erred in disregarding directions in the National Traffic & Motor Vehicle Safety Act that the Act be carried out through the National Traffic Safety Bureau and that standards be issued in consultation with the Vehicle Equipment Safety Commission and the National Motor Vehicle Safety Advisory Committee.

3. Respondents erred in failing to make findings in the order necessary to establish compliance by Respondents with the criteria and limitations in the National Traffic & Motor Vehicle Safety Act.

4. Respondents erred in arbitrarily rejecting the petitions for reconsideration filed by Petitioners.

SUMMARY OF ARGUMENT

This is a petition for review of an order established by the Federal Highway Administrator requiring all passenger cars manufactured after January 1, 1969 to be equipped with factory-installed head restraints meeting specified minimum requirements. The order, if valid, will nullify any conflicting state standards, prohibit the importation of any foreign cars not so equipped, and impose civil penalties of up to $400,000 on any person who manufactures or sells any new passenger car in the United States which does not comply with its provisions. The order also will effectively preclude independent manufacturers and retailers who are members of the Automotive Parts and Accessories Association and the Sterling Products Company, which have in the past produced and sold millions of head restraints to new and used car buyers, from supplying such devices for new motor vehicles after January 1, 1969.

The validity of the order is challenged on the ground that it was issued without observance of the procedures required by the National Traffic & Motor Vehicle Safety Act to assure against arbitrary administrative action and on the further ground that Respondents failed to make the responsible findings necessary to show adherence to the criteria and limitations with respect to such orders set forth in the basic statute.

The National Traffic and Motor Vehicle Safety Act expressly provides that Federal motor vehicle safety standards shall be established by "order" and incorporates the provisions of the Administrative Procedure Act applicable to agency adjudication

and rules which must be based on a record after opportunity for agency hearing. Despite such requirements, Respondents acted under procedures which do not require orders to be based on a record and which authorize such orders to be issued by the Federal Highway Administrator without consideration of the evidence submitted by interested parties.

Respondents also ignored specific directions in the National Traffic and Motor Vehicle Safety Act that the Secretary carry out the provisions of the Act through the National Traffic Safety Bureau and consult with the Vehicle Equipment Safety Commission and a properly constituted National Motor Vehicle Safety Advisory Committee in establishing standards. These provisions and others were incorporated in the Act to make certain that Federal motor vehicle safety standards would be based on "reliable information" and "experience" and that there would be consultation with those on whom such orders would have a major impact.

Finally, Respondents failed to make the findings required by the Act and essential to a judicial determination of whether the order is proper under the criteria specified in the Act, despite the detailed provisions in the Act for judicial review of orders establishing Federal motor vehicle safety standards and the requirement that such orders be based on findings having substantial evidentiary support in the record. In the present posture of the case, it is not appropriate or possible for the Court to determine whether there is substantial evidence in the record as a whole for such findings as might have been made by Respondents. Nevertheless, it is noteworthy that many of the comments submitted in the course of the administrative proceedings raised serious questions as to whether the order would carry out the objectives of the Act.

It is submitted that Respondents have not acted in accordance with the law and that the order establishing Federal Motor Vehicle Safety Standard No. 202 must be set aside.

ARGUMENT

I

FEDERAL MOTOR VEHICLE SAFETY STANDARD NO. 202 WAS ESTABLISHED BY RESPONDENTS WITHOUT OBSERVANCE OF PROCEDURES REQUIRED BY THE NATIONAL TRAFFIC AND MOTOR VEHICLE SAFETY ACT AND NECESSARY TO ASSURE BASIC FAIRNESS IN THE ADMINISTRATIVE PROCESS

A. The Act Requires That Standards Be Established By Orders Made On A Record After Opportunity For Agency Hearing.

1. The Applicability of the Adjudicatory Provisions of the Administrative Procedure Act.

Two of the principal procedural safeguards in the National Traffic and Motor Vehicle Safety Act (15 U.S.C. §1381, *et seq.*) are contained in section 103 (5 U.S.C., §1392) which states that the Administrative Procedure Act shall apply to all orders establishing Federal motor vehicle safety standards, and section 105 (15 U.S.C., §1394) which provides for judicial review of such orders. An analysis of these provisions makes clear the intent of Congress that Federal motor vehicle safety standards be made on a record after opportunity for agency hearing and be supported by findings based on substantial evidence in that record.

Subsection (a) of section 103 of the Act (15 U.S.C., §1392(a)) expressly provides that Federal motor vehicle safety standards shall be established "by order." Subsection (b) of section 103 (15 U.S.C., §1392(b)), making the Administrative Procedure Act applicable to the administrative proceedings for the establishment of safety standards, and section 105 (15 U.S.C., §1394) providing for judicial review under the Administrative Procedure Act, similarly refer to Federal motor vehicle safety standards as "orders." Under section 2(d) of the Administrative Procedure Act (5 U.S.C., §551(6)), "order" is defined to mean "the whole or a part of a final

disposition . . . of an agency in any matter other than rule making but including licensing." The same section of the Administrative Procedure Act (5 U.S.C., §551 (7)) defines "adjudication" as "agency process for the formulation of an order."

Since the "draftsmen and proponents" of the Administrative Procedure Act were "aware of this realistic distinction between rule making and adjudication" and "shaped the entire Act around it" (Attorney General's Manual on the Administrative Procedure Act, p. 15), the Government can hardly contend that these explicit references to the adjudicatory processes of the Administrative Procedure Act were unintended. Cf. *Air Line Pilots Association v. Quesada,* 276 F.2d 892, 897 (2d Cir. 1960). Moreover, other provisions of the National Traffic and Motor Vehicle Safety Act show that Congress used the term "order" in section 103(a) with a complete understanding of its significance. For example, section 103(h) of the Act (15 U.S.C. §1392(h)), which applied only to the issuance of Initial Standards and required that the Initial Standards be based upon "existing safety standards," does not state that the Secretary must establish Initial Standards by order, but only that he shall "issue" such initial standards. Similarly, section 119 of the Act (15 U.S.C., §1407) which "grants the Secretary the usual authority to issue, amend and revoke such rules and regulations as he determines necessary" (H. Rep. No. 1776, 89th Cong., 2d Sess., p. 30), also avoids any reference to adjudicatory processes and specifically refers to "rules and regulations" rather than "orders." Cf. *FMC v. Anglo-Canadian Shipping Co.,* 335 F.2d 255 (9th Cir. 1964). These differences in language in the various sections of the Act obviously are deliberate and reflect a full awareness on the part of the draftsmen of the National Traffic and Motor Vehicle Safety Act of the distinction between "orders" and "rules" in administrative proceedings.

In *American Airlines, Inc. v. CAB,* 123 U. S. App. D. C. 310, 359 F.2d 624 (1966), as in *Air Line Pilots Association v. Quesada,* 276 F.2d 892 (2d Cir. 1960), the Court held that where an agency under its organic act may deal with a particular subject matter either by rule making or by adjudication, the agency need not

comply with the adjudicatory procedures in the Administrative Procedure Act when it decides in an appropriate case to act by rule rather than by order. However, in both cases, the courts recognized that the agency would have to comply with such procedures if it acted under the adjudicatory provisions of the Federal Aviation Act (49 U.S.C., §1429). The National Traffic and Motor Vehicle Safety Act, unlike the Federal Aviation Act, requires Federal motor vehicle safety standards to be established by "order" and does not provide that they may be established alternatively by rule. The *Air Line Pilots* case, *supra*, explicitly recognizes this distinction and points out that the Federal Aviation Agency would have to comply with the adjudicatory processes in the APA if it were acting under the "order" provisions in the Federal Aviation Act. *Id.*, 276 F.2d at 897. See also, *Abbott Laboratories v. Gardner*, 387 U. S. 136 (1967).

In view of the plain language of the National Traffic and Motor Vehicle Safety Act, resort to the rather uncertain legislative history on this point would appear to be superflous. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384, 395 (1951) (concurring opinion.)

For one thing, the bill reported by the Senate Committee on Commerce, unlike the bill as enacted, contained detailed administrative procedures for the issuance of standards, referred to the administrative proceedings as "rule making process," provided that the provisions of sections 3, 4 and 6 of the Administrative Procedure Act would be applicable, and that the provisions of sections 7 and 8 of the Act would not be applicable. S. Rep. No. 1301, 89th Cong., 2d Sess., pp. 25-26. The bill as enacted omits all of this language and provides instead that: "The Administrative Procedure Act shall apply to all orders establishing, amending, or revoking a Federal motor vehicle safety standard." (Section 103(b), 15 U.S.C., §1392(b)) This language originated in the House and was contained in the same section of the House bill as required the Secretary to "issue initial Federal motor vehicle safety standards based upon existing public standards on or before January 31, 1967." H. Rep. No. 1776, 89th Cong., 2d Sess., pp. 2-3. The House Report states that under the House language, which is identical to the

language in the bill as enacted, "The Secretary may utilize either the informal rule making procedures of section 4 of the APA or the more formal and extensive procedures of that Act, whichever is more appropriate in a given situation. He must, however, establish a record which shall be the basis for his actions." *Id.* at 16. A reasonable interpretation of this statement is that the rule making procedure in section 4 of the APA would be appropriate for the issuance of the initial standards, which did not have to be established by "order," but that the more formal and extensive adjudicatory procedures of the APA would be appropriate for all other standards, which were required to be established by "order."

Another recent statute containing language similar to section 103(b) of the National Traffic and Motor Vehicle Safety Act (15 U.S.C., §1392(b)) is the Flammable Fabrics Act of 1967. (15 U.S.C., 1191, *et seq.*) Section 4(d) of this latter statute (15 U.S.C., §1193(d)) provides that: "The Administrative Procedure Act shall apply to the issuance of all standards or regulations or amendments thereto under this section." Significantly, the Report of the Senate Committee on Commerce on the Flammable Fabrics Act, referring to this provision, states: "The bill provides similarly to the National Traffic and Motor Vehicle Safety Act of 1966 that the provisions of the Administrative Procedure Act shall apply to the issuance of all standards or regulations or amendments. . . . The provisions of the Administrative Procedure Act are intended to afford fair procedures to persons involved in administrative agency proceedings. They also serve to assure that administrative decisions will be based on evidence and other relevant information, rather than on conjecture and assumptions. Under these procedures, interested parties will be given an opportunity for a hearing and in the event the Secretary's action is challenged, the courts will have to determine whether the Secretary's findings are supported by substantial evidence. In the view of the committee, these procedural safeguards will strengthen the bill by making certain that whatever action is taken will be based on a proper record and impartial deliberation." (S. Rep. No. 407, 90th Cong., 1st Sess., p. 5)

Also relevant in this connection is the Final Report of the Committee on Administrative Procedure (Senate Document No. 8, 77th Cong., 1st Sess., 1941), a Report which had a "profound" influence on the development of the Administrative Procedure Act (See Editor's Preface, Administrative Procedure in Government Agencies, Virginia Legal Studies Series 1968, p. vii), which recognizes that "hearings in the exercise of substantive rule making authority as well as under adjudicatory procedures have become usual . . . where safety in transportation is regulated." Final Report, *op. cit., supra,* p. 105. This Report notes that "hearings are now generally held in connection with the fixing of prices and wages, the prescription of commodity standards, and the regulation of competitive practices." *Id.* at 107. The Committee approved this practice in the "formulation of rules of the character mentioned above," pointing out that:

> "The regulation of these matters bears upon economic enterprise and touches directly the financial aspects of great numbers of businesses affected, either by imposing direct costs or by limiting opportunities for gain. Appreciation of these effects, both by businessmen and government officials, seems to be the chief cause of the increased use of hearings in administrative matters." (*Id.* at 107-108)

Such considerations explain the procedural requirements in the National Traffic and Motor Vehicle Safety Act since orders establishing standards carry with them substantial legal obligations and consequences. See also, *Toilet Goods Ass'n v. Gardner,* 360 F.2d 677, 683 (2d Cir. 1966), *affirmed,* 387 U. S. 158 (1967).

For example, Section 108(a) of the Act (15 U.S.C., §1397(a)) provides that "no person shall manufacture for sale, sell, offer for sale, or introduce or deliver for introduction in interstate commerce, or import into the United States, any motor vehicle or item of motor vehicle equipment . . . unless it is in conformity with such standard. . . ." Section 109 of the Act (15 U.S.C., §1398) provides that any person who violates Section 108 "shall be subject to a civil penalty of not to exceed $1,000.00 for each such violation . . . except that the maximum civil penalty shall not exceed $400,000 for any related series of violations."

Section 103(d) of the Act (15 U.S.C., §1392(d)) provides that whenever a Federal motor vehicle safety standard is established by the Secretary, "no State . . . shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal Standard."

Section 111(a) of the Act (15 U.S.C., §1400(a)) provides that if any motor vehicle or item of motor vehicle equipment is determined not to conform to any standard, the manufacturer must immediately repurchase the motor vehicle or item of motor vehicle equipment at the price paid plus "reasonable reimbursement of not less than 1 per centum per month of such price. . . ."

It is easy to understand the concern of Congress that administrative action of such sweeping impact be taken only on the basis of a record after opportunity for agency hearing.

2. The Provisions for Judicial Review Of Orders Establishing Standards.

The judicial review provisions of the National Traffic and Motor Vehicle Safety Act confirm the conclusion that orders establishing Federal motor vehicle safety standards must be made on a record after opportunity for agency hearing and be justified by findings having substantial evidentiary support in that record.

Under Section 105 of the Act (5 U.S.C., §1394) upon the filing of a petition for judicial review, the Secretary is required to file in the court "the record of the proceedings on which the Secretary based his order. . . ." This same section also provides that "the court shall have jurisdiction to review the order in accordance with section 10 of the Administrative Procedure Act. . . ." (5 U.S.C., §706)

The intent of Congress that this language would make applicable the scope of review provision in subsection (e) of section 10 of the Administrative Procedure Act (5 U.S.C., §706(2)(E)) is established by statements in both the House and Senate Committee Reports. The House Report on the legislation states that under these provisions, (1) the Secretary must "establish a record which shall be the basis for his actions" and (2) that "a reviewing court will consider the entire record before it and the findings of the Secretary will be sustained when supported by substantial evidence on the basis of the entire record." (H. Rep. No. 1776, 89th Cong., 2d Sess., pp. 7, 21) The language of the bill reported in the Senate, as already noted, qualified the references to the Administrative Procedure Act in section 103(b) of the Act and, therefore, is not entirely relevant to the unqualified reference to the Administrative Procedure Act in the bill as enacted. However, even the qualified language in the bill reported in the Senate was understood to require that the Secretary "must maintain a record of the evidence and comments on which he bases the standards" and that in the event of judicial review, the agency's "findings shall be upheld if supported by substantial evidence on the record considered as a whole." (S. Rep. No. 1301, 89th Cong., 2d Sess., pp. 7, 8) Confirming this is the additional provision in section 105 that in the event of a remand by the court for the taking of additional evidence, "the Secretary may modify his findings as to the facts, or make new findings, by reason of the evidence so taken. . . ."

These provisions for judicial review would be "meaningless" if the standards established by the Secretary did not have to be based on the record and be justified by findings having substantial evidentiary support in that record. *O'Dwyer v. CIR*, 266 F.2d 575, 580 (4th Cir. 1959). Only when the court is not required to review the substantiality of the evidence may the agency rely on matters *dehors* the record. See *California Citizens Bank Ass'n. v. United States*, 375 F.2d 43, 54 (9th Cir. 1967). Thus, the courts have consistently held or assumed that provisions for judicial review, such as those contained in this Act, make it essential that the order or regulation subject to review be based on the record in the administrative

proceeding, be justified by findings having substantial evidentiary support in that record, and be formulated under hearing procedures such as those contained in the Administrative Procedure Act. See, *e.g., SEC v. Chenery Corp.*, 332 U. S. 194 (1947); *SEC v. Chenery Corp.*, 318 U. S. 80, 94 (1943); *Morgan v. U. S.*, 298 U. S. 468, 480 (1936); *United States v. Baltimore & Ohio Railroad Co.*, 293 U. S. 454 (1935); *Wirtz v. Baldor Electric Co.*, 119 U. S. App. D. C. 122, 337 F.2d 518 (1963); *Coffee v. Jordan*, 107 U. S. App. D. C. 113, 275 F.2d 1 (1959); *Boudin v. Dulles*, 98 U. S. App. D. C. 305, 235 F.2d 532, 535 (1956); *O'Dwyer v. CIR, supra*. See also, Davis, *Administrative Law Treatise*, 16.05 and *Attorney General's Manual on the Administrative Procedure Act*, pp. 32-34, 41-42.[1]

A further indication of the intent of Congress as to the significance of the judicial review provisions of section 105 of the Act is the statement in the House Report on the legislation that section 105 of the Act "sets forth a procedure for judicial review based on comparable provisions in the Food and Drug Act." (H. Rep. No. 1776, 89th Cong., 2d Sess., p. 12) At another point, the Report states that: "The provisions of this section are comparable to the general judicial review

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[1] These essential requirements apply whether the agency's action falls within the category of rule making, adjudication, or a combination of both. Two examples in connection with "rule making" are discussed in the *Attorney General's Manual on the Administrative Procedure Act*, namely, rate making proceedings before the Interstate Commerce Commission (for carriers) and the Secretary of Agriculture (for stockyard agencies). The Manual notes that "nothing" in the Interstate Commerce Act or the Packers and Stockyards Act requires that such rate orders be "made on the record; or provides for the filing of the transcript of the administrative record with the reviewing court, or defines the scope of judicial review." However, because both types of rate orders are subject to judicial review under the Urgent Deficiencies Act of 1913 (now 28 U.S.C., §2321, *et seq.*), the Manual points out that "both of these agencies and the courts have long assumed that such rate orders must be based upon the record made in the hearing; furthermore, it has long been the practice under the Urgent Deficiencies Act to review such orders on the basis of the administrative record which is submitted to the reviewing court." (*Attorney General's Manual, op. cit., supra*, pp. 33-34.) There is a similar discussion in the Manual involving the application of this principle in adjudicatory proceedings. *Id.* at 41-42. This reasoning applies a *fortiori* to the present case since here the Act does require the filing of the "record" and subjects the agency's order to review under the broadest terms of the Administrative Procedure Act.

provisions in the Federal Food, Drug and Cosmetic Act (21 U.S.C., §371(f))." *Id.* at 20. It is noteworthy that neither the provisions for judicial review nor the provisions for the promulgation of "regulations" in the Federal Food, Drug and Cosmetic Act, both of which are contained in section 371 of title 21, make any reference to the Administrative Procedure Act. However, the judicial review provisions do expressly require findings supported by substantial evidence and the promulgation provisions expressly require hearings on objections to proposed standards. (21 U.S.C., §371(e) and (f))

The administrative procedure set forth in the Federal Food, Drug and Cosmetic Act does not contain all of the safeguards incorporated in sections 7 and 8 of the Administrative Procedure Act (5 U.S.C., §556, 557). If Congress intended that the procedures for the establishment of motor vehicle safety standards could be shaped in a fashion similar to those in the Federal Food, Drug and Cosmetic Act, this would permit some deviation in such proceedings from the strict requirements of sections 7 and 8 of the Administrative Procedure Act. Cf. *American Air Lines, Inc. v. CAB*, 123 U. S. App. D. C. 310, 359 F.2d 624 (1966).

The explicit references to the Administrative Procedure Act in the National Traffic & Motor Vehicle Safety Act appear to stand in the way of such a construction. In any event, even if such a construction of the Act were possible, the "comparable" provisions of the Federal Food, Drug and Cosmetic Act and the judicial review provisions in both statutes still would require procedures for the establishment of orders which, at a minimum, stipulated that the order be based on the record, on findings having substantial evidentiary support in the whole record, and that interested parties be given an appropriate hearing before final action. *Cf. Abbott Laboratories v. Gardner*, 387 U. S. 136, 143 (1967); *Toilet Goods Ass'n v. Gardner*, 360 F.2d 677, 683 (1966), *affirmed*, 387 U. S. 158 (1967).

As already discussed, the plain language of the National Traffic and Motor Vehicle Safety Act requires that Federal motor vehicle safety standards be established under the "adjudicatory" provisions of the Administrative Procedure Act. However, on the basis of the precedents cited above, it appears clear that whether such standards are "rules" or "orders," they are the type of regulation which the

Congress and the courts have long required be based on an agency record after opportunity for agency hearing and on findings having substantial evidentiary support in that record. The language and legislative history of the National Traffic and Motor Vehicle Safety Act establishes that such administrative procedures were contemplated by the Congress under the Act and must be enforced by the Court in this case.

B. Respondents' Rules Of Procedure Do Not Satisfy The Applicable Provision Of The Administrative Procedure Act.

Respondents' order establishing Federal Motor Vehicle Safety Standard No. 202 was promulgated by the Federal Highway Administrator on the basis of procedures which failed to satisfy the requirements of the National Traffic and Motor Vehicle Safety Act and the Administrative Procedure Act. Apparently, Respondents assumed that despite the enormous impact on the public and on the industry of such Federal orders, they need not act on the basis of a record, need not make any supporting findings, need not offer any rationale for the exercise of their judgment and discretion, need not act through or consult with agencies specifically designated by Congress to assist in achieving the objectives of the Act, and need not afford any semblance of a hearing to interested parties.

In so doing, Respondents have misconstrued or disregarded procedural requirements set forth in the National Traffic and Motor Vehicle Safety Act and have attempted to establish on the basis of assumptions and conjecture restrictions which under the law can be imposed only upon the basis of a reasoned analysis of reliable evidence after fair proceedings.

Respondents' Rules of Procedure for the establishment of Federal motor vehicle safety standards (23 C.F.R. §216, *et seq.*) do not purport to satisfy the requirements in the Administrative Procedure Act for agency action which must be based on a record after opportunity for agency hearing.

The Rules of Procedure provide that the docket in any agency proceeding shall contain "information and data deemed relevant by the Federal Highway Administrator." (23 C.F.R. §216.5) They do not require a transcript or summary minutes of all information which may be submitted. (23 C.F.R. §216.21) They contain no provision for findings or exceptions and expressly provide that standards are "not necessarily based exclusively on the record of the hearing." (23 C.F.R. §216.27)

In these and other important respects, the Rules of Procedure followed in this proceeding afford fewer procedural safeguards than Respondents' Initial Rules of Procedure under which the Initial Standards were promulgated on January 31, 1967. This dimunition in procedural safeguards is difficult to comprehend since the Initial Standards, unlike all subsequent standards, including the standard now under review, did not have to be established by "order," were to be based on "existing safety standards," and had to be issued within a short period after the agency was staffed and funded. See subsection (h) of section 103 of the Act (15 U.S.C., §1392(h)). A "streamlined rule making process" for the issuance of the Initial Standards was contemplated by Congress. S. Rep. No. 1301, 89th Cong., 2d Sess., p. 7)

Nevertheless, Respondents' Initial Rules of Procedure, in contrast to the current Rules of Procedure, did provide that the agency docket "will contain the record in this proceeding," required a transcript or summary minutes of all proceedings, and expressly stated that the standards would "be based exclusively on the record." (31 Fed. Reg. 13128).[2]

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[2] It is also noteworthy that the Initial Standards promulgated on January 31, 1967 set forth several findings in the language of the statute, explained that "considerations of time prevent discussion of comments on individual standards," and gave assurance that in future proceedings when it will not operate under an "unusually tight" time schedule, "the agency intends to adopt a policy of the greatest possible disclosure of underlying considerations. . . ." (32 Fed. Reg. 2408).

The significance of these procedural changes is enlarged by the provisions for the issuance of standards in the Initial Rules of Procedure and the current Rules of Procedure. The Initial Rules of Procedure, in addition to providing that the initial standards would be based "exclusively" on the record, also provided that the issuing authority shall be the Secretary "or a person to whom he has delegated final authority." However, the current Rules of Procedure state that the Federal Highway Administration shall "designate a representative to conduct any hearing held"; that the Chief Counsel of the Federal Highway Administration shall "designate a member of his staff to serve as legal officer at the hearing"; that "final rules" are prepared by "representatives of the office concerned and the office of Chief Counsel"; and, thereafter, in the words of the rules of procedure: "The rule is then submitted to the [Federal Highway] Administrator for his consideration. If the Administrator adopts the rule, it is published in the Federal Register. . . ." (23 C.F.R. §§216.27 and 216.29)

Under these Rules of Procedure, which were the procedures followed by the Respondents in this case, the standards are issued by an Administrator who can act not only without relying on the record, but without even knowing what comments or evidence or data may have been submitted for consideration in any of the various and sundry forms in which such comments, evidence or data may be submitted. Such procedures are a sham. *Morgan v. United States*, 298 U. S. 468, 480 (1936). They make it evident that there is no necessary or required connection between the thousands or tens of thousands of pages of statements, presentations, suggestions and requests submitted to various staff members of the agency over a period of months or years by interested parties and the final action taken by the Administrator. The grievous failings in this administrative process cannot be concealed behind a file box full of exhibits and documents which the Administrator need not even know about when he renders the agency's final order.

As has already been shown, Respondents' orders must be promulgated after proceedings which comply with the applicable provisions of the Administrative Procedure Act. The order under review was not established on the basis of any such proceedings and it, therefore, cannot be sustained.

C. Respondents Have Disregarded Directions In The Act That Its Provisions Be Implemented By The National Traffic Safety Bureau And Requiring Consultation With A Properly Constituted National Motor Vehicle Safety Advisory Council And The Vehicle Equipment Safety Commission.

1. **The Act Requires That the Secretary Carry Out Its Provisions Through The National Traffic Safety Bureau.**

Section 115 of the National Traffic and Safety Act (15 U.S.C., §1404) contained the following provision with regard to carrying out the provisions of the Act:

> "The Secretary shall carry out the provisions of this Act through a National Safety Agency (hereinafter referred to as the "Agency"), which he shall establish in the Department of Commerce. The Agency shall be headed by a Traffic Safety Administrator who shall be appointed by the President, by and with the advice and consent of the Senate. . . . The Administrator shall be a citizen of the United States, and shall be appointed with due regard for his fitness to discharge efficiently the powers and the duties delegated to him pursuant to this Act. The Administrator shall perform such duties as are delegated to him by the Secretary." (Pub. L. 89-563, §115, 80 Stat. 727 (1966)).

This provision was amended by Public Law 89-670, §8(i), 80 Stat. 943 (1966) which substituted "Bureau" for "Agency" and "Director" for "Administrator." Public Law 89-670 placed the created body in the Department of Transportation, but the text of section 115 was not changed to reflect this transfer from the Department of Commerce. See 15 U.S.C., §1404, note. Public Law 89-670 did not

alter the functions of the "Bureau" and specifically provided that except for the change in nomenclature, "all other provisions of the National Traffic and Motor Vehicle Safety Act of 1966 shall apply." (49 U.S.C., §§1652(f)(1)).

Both the present Secretary of Transportation and the then Secretary of Commerce opposed the creation of a separate agency to administer the Act. See Hearings on H.R. 13228 before the Committee on Interstate and Foreign Commerce, House of Representatives, 89th Cong., 2d Sess. pp. 164-65, 183. The proposed legislation as reported in the Senate did not contain any provision for a National Traffic Safety Agency. See S. Rep. No. 1301, 89th Cong., 2d Sess.

However, the House Committee on Interstate and Foreign Commerce, overriding the objections of the Executive Branch, did add the provisions of section 115 to the bill it reported. H. Rep. No. 1776, 89th Cong., 2d Sess., p. 7. In explaining the purpose of this section, the House Report states:

> "The Committee decided that in order to achieve the necessary unification in traffic safety responsibilities that an agency should be created to administer the act, under an identifiable official who, though subordinate to the Secretary, would be primarily responsible for carrying out this Federal traffic safety program. . . . [W]ith this agency, under the direction of a Presidentially appointed Administrator, the Federal Government can serve as a catalyst and clearing house to bring order to the search for safety and thereby to lead to a marked reduction of highway deaths and injuries." *Id.* at 29

The Conference Committee retained the language in the House bill. H. Rep. No. 1919, 89th Cong., 2d Sess., p. 10. In explaining the Senate conferees' acceptance of this provision of the House bill, Senator Magnuson, the Chairman of the Senate Committee on Commerce, stated that the Senate conferees agreed that "responsibility for so significant a program as traffic safety should be focused upon a statutory administrator and a statutory agency." 112 Cong. Rec. 20599 (Aug 31, 1966)

Despite this provision in the National Traffic and Safety Act, the Secretary of Commerce and the Secretary of Transportation have refused to "carry out" the provisions of the Act through the National Traffic and Safety Agency and have instead delegated authority to administer the Act to the Federal Highway Administration. This has been accomplished by explicit delegations to the Federal Highway Administration and by various provisions of the Respondents' Rules of Procedure (23 C.F.R. §§216.3, 216.9).

Respondents' Rules of Procedure specifically provide that the Administrator of the Federal Highway Administration initiates "rulemaking on his own motion" (23 C.F.R. §216.13); that the "regulatory docket" shall contain such information and data as is deemed relevant by the "Administrator of the Federal Highway Administration" (23 C.F.R. §216.5); that the "Administrator" of the Federal Highway Administration shall designate "a representative to conduct any hearings" which may be held (23 C.F.R. §216.27(b)); "that the chief counsel of the Federal Highway Administration designates a member of his staff to serve as a legal officer at the hearing" (*Ibid*); that "final rules are prepared by representatives of the office concerned and the office of chief counsel" (23 C.F.R. §216.29); that such rules are "then submitted to the Administrator for his consideration" (*Ibid*); and finally, that "if the Administrator adopts the rule, it is published in the Federal Register." (*Ibid*)

There is no reference to the National Traffic Safety Bureau or to the Presidentially appointed director of that Bureau, Dr. William Haddon, Jr., in these Rules of Procedure or in the Secretary's delegations of authority. The Executive Branch, reflecting its initial opposition to the proposal contained in section 115 of the Act, has simply chosen to ignore that provision of the Act and to make delegations and adopt procedures which in no way comply with the directions of the Congress.

Apart from the failings of this administrative procedure under such cases as *Morgan v. United States*, 298 U. S. 468, 480 (1936), which have been discussed, it is evident that the Secretary's attempt to by-pass the National Traffic Safety Bureau cannot stand in the face of the specific mandate in section 115 of the Act that the provisions of the Act be carried out through the National Traffic Safety Bureau. The issue here is not the extent to which the Secretary can delegate functions vested in him under the Act, but whether he can exercise such authority in a manner which is directly contrary to explicit limitations in the Act. Cf. *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U. S. 111 (1947) and *Cudahy Packing Co. v. Holland*, 315 U. S. 357 (1942). Here, Congress has provided by express provision that the particular functions be carried out through a named agency headed by a director appointed by the President by and with the advice and consent of the Senate. The Secretary, like other administrators, is "not free to ignore plain limitations on his authority." *Peters v. Hobby*, 349 U. S. 331, 345 (1955). Under these circumstances, the Secretary, if he delegates his functions, must delegate them to the authority "designated" by Congress. *Cudahy* case, *supra*, 315 U. S. at 361.

2. The Act Requires Consultation with a Properly Constituted National Motor Vehicle Safety Advisory Council and the Vehicle Equipment Safety Commission.

Respondents also have ignored specific requirements in the National Traffic and Motor Vehicle Safety Act that in prescribing standards, the Secretary "shall" consult with the Vehicle Equipment Safety Commission (section 103(f)(2) of the Act, 15 U.S.C., §1392(f)(2)), and "shall" consult with the National Motor Vehicle Safety Advisory Council (section 104(b) of the Act, 15 U.S.C., §1393(b)).

The Vehicle Equipment Safety Commission is "specifically mentioned [in the Act] because 44 states and the District of Columbia are members of this organization, and it is the major existing agency which has authority to propose uniform

vehicle safety standards for the member states to consider for adoption." S. Rep. No. 1301, 89th Cong., 2d Sess., p. 7. It was "expected" that the Vehicle Equipment Safety Commission "will actively participate, through consultations, in the formulation of safety standards." H. Rep. No. 1776, 89th Cong., 2d Sess., pp. 17-18.

The "duties" of the National Motor Vehicle Safety Advisory Committee established under section 104 of the Act (15 U.S.C., §1393) are "to advise and make recommendations to the Secretary with respect to motor vehicle safety standards under this Act." H. Rep. No. 1776, 89th Cong., 2d Sess., p. 19. Such an agency was not provided in the Senate bill and was added to the legislation during its consideration in the House. The House Report explains that under the language requiring consultation with the Advisory Committee, "the Secretary is required to seek [its] advice and recommendations before establishing, amending or revoking a safety standard." *Ibid.*

These provisions of the Act requiring consultation with the agencies designated reflected the awareness of the Congress that standards "cannot be set in a vacuum" and must be based upon "experience" and "reliable information." H. Rep. No. 1776, 89th Cong., 2d Sess., p. 11; S. Rep. No. 1301, 89th Cong., 2d Sess., p. 7. It was expected that these agencies would be given an opportunity to "study and comment" on the Secretary's proposals (S. Rep., *op. cit., supra,* p. 7) and, of course, it was also expected and required that the Secretary consider such comments and other "relevant available motor vehicle safety data, including the results of research, development, testing and evaluation activities conducted pursuant to this Act" in establishing a standard in each case that would be "reasonable, practicable and appropriate for the particular type of motor vehicle or item of motor vehicle equipment for which it is prescribed." (Section 103 of the Act, 15 U.S.C., §1392)

The provisions of the Act providing for the establishment of the National Motor Vehicle Safety Advisory Committee also expressly provided that a majority of its members shall be representatives of the general public "and the remainder shall include representatives of motor vehicle equipment manufacturers." (Section

104(a) of the Act, 15 U.S.C., §1393(a)) No limit was placed in the Act on the total membership of the Council. It was explained that the categories for membership would "insure that the Secretary have available to him the advice and recommendations of a cross-section of those principally interested in the formulation of safety standards." (H. Rep. No. 1776, 89th Cong., 2d Sess., p. 19)

As pointed out in the Statement of the Case, *supra,* Petitioners, in the course of the administrative proceedings, specifically called attention to the fact that the Advisory Council established under the Act did not contain any representative of "motor vehicle equipment manufacturers" as required by the Act. It is significant that some time after the order in this proceeding was established, the Secretary expanded the size of the Council and did appoint to it representatives of automotive equipment manufacturers. This tardy recognition of Respondents' obligations under the Act cannot serve to retroactively cure the deficiencies in the Advisory Council at the time the order in this proceeding was established.

Furthermore, there is nothing in Respondents' order to indicate that the Secretary did consult with either the Vehicle Equipment Safety Commission or the National Motor Vehicle Safety Advisory Council before establishing the order, or if he did, what comments and recommendations these agencies made with regard to the order, or if they made any, what consideration the Secretary gave to such comments.[3] The whole process established in the law for assuring that the broad powers conferred upon the Secretary would not be "abused" (S. Rep. No. 1301, 89th Cong., 2d Sess., p. 4) appears to have been disregarded in this case. The result is an order which is not in accordance with law and which, therefore, must be set aside.

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[3] The Vehicle Equipment Safety Commission did send a telegram to the Federal Highway Administrator with regard to the proposed standard (R. 725). There is no indication in the record, however, that the Administrator consulted with the Commission with respect to any aspect of the standard or that the Commission's views were given any consideration.

D. The Procedures Followed By Respondents Do Not Comply With Minimum Requirements Necessary To Assure Fairness In Its Administrative Process.

The National Traffic and Motor Vehicle Safety Act represents an important effort by the Congress to deal with a problem of enormous impact on the public and on industry. Its objectives will not be deterred by requiring the far-reaching administrative decisions which must be made to implement its provisions to be made under procedures which will assure their reasonableness and efficacy.

There is no objection to the delegation to administrative agencies of the power to implement statutory commands. However, in all such cases, "the standards set up for the guidance of the administrative agency, the procedure which it is directed to follow and the record of its action which is required by the statute or which is in fact preserved" must be "such that Congress, the courts and the public can ascertain whether the agency has conformed to the standards which Congress has prescribed." *Opp Cotton Mills, Inc. v. Administrator,* 312 U. S. 126, 144 (1941). In addition, as stated in *Ideal Farms v. Benson,* 181 F. Supp. 62, 69 (D.C. N.J. 1960), *affirmed,* 288 F.2d 608 (3rd Cir. 1961): "Administrative due process requires (1) opportunity to be heard, (2) due notice of hearing, (3) fair conduct of hearing, (4) support in the record for the decision, (5) submission of proposed findings in a tentative report, and (6) opportunity to file and be heard upon exceptions to such report." See also, *Amos Treat & Co. v. SEC,* 113 U. S. App. D. C. 100, 306 F.2d 260 (1962); *Hoxsey Cancer Clinic v. Folsom,* 155 F. Supp. 376, 378 (D.C.D.C. 1957).

Such requirements cannot be dispensed with because of claims of "inconvenience and added expense" (*Wong Yang Sung v. McGrath,* 339 U. S. 33, 49 (1950)), or because of assumptions that the agency will act in the "public good" (*Panama Refining Co. v. Ryan,* 293 U. S. 388, 420-421, 431-433 (1935)). Cf. *Wirtz v. Baldor Electric Co.,* 119 U. S. App. D. C. 122, 337 F.2d 518, 528 (1963). Fair procedures are required by elemental concepts of due process and to satisfy

fundamental constitutional limitations. *Ibid.* This is especially true where the agency's action, as in this case, serves to nullify powers traditionally exercised by the states (*North Carolina v. United States,* 325 U. S. 507, 511 (1945)), or to subject citizens to severe penalties for violation of the agency's orders (*Panama Refining Co., supra,* 293 U. S. at 432). See also, *Hotch v. United States,* 212 F.2d 280 (9th Cir. 1954).

The Administrative Procedure Act reflects these concepts of fair procedure, but even if that Act did not exist, similar agency procedures would be required by the Constitution and judicial concepts of fair procedure. *Wong Yang Sung, supra,* 339 U. S. at 49 and cases cited, *supra.* See also, *American Airlines, Inc. v. CAB,* 123 U. S. App. D. C. 310, 359 F.2d 624, 632 (1966), which acknowledges this Court's "readiness to lay down procedural requirements deemed inherent in the very concept of fair hearing for certain classes of cases, even though no such requirements had been specified by Congress." As stated in *Wong Yang Sung, supra,* 339 U. S. at 49: "The constitutional requirement of due process of law derives from the same source as Congress' power to legislate and where applicable, permeates every valid enactment of that body."

The Federal Highway Administrator has attempted to implement the provisions of the National Traffic & Motor Vehicle Safety Act by procedures which might be more appropriate to the award of government contracts to the Nation's road builders. Cf. *Perkins v. Lukens Steel Co.,* 310 U. S. 113 (1940). Such procedures simply do not suffice either under the law he is administering, under the commands of the Constitution, or under judicial requirements for administrative fairness.

II

RESPONDENTS FAILED TO MAKE THE ESSENTIAL FINDINGS REQUIRED TO SHOW COMPLIANCE WITH THE CRITERIA AND LIMITATIONS ON THE ESTABLISHMENT OF ORDERS UNDER THE NATIONAL TRAFFIC AND MOTOR VEHICLE SAFETY ACT.

A. The Order Cannot Be Sustained Unless Supported By Findings Adequate To Show Compliance With The Act.

Respondents' order in this case would have to be set aside because of Respondents' failure to make supporting findings essential to its validity, even if they had otherwise satisfied the procedural requirements of the National Traffic & Motor Vehicle Safety Act. See, in general, cases cited under Argument I, *supra* at 18. As stated in *PUC v. FPC*, 205 F.2d 116, 119 (3rd Cir. 1953): "An administrative order must contain an express finding of the ultimate fact upon which the organic statute requires the agency action to be predicated. The cases on this point are legion . . . It is also settled that an administrative order must contain express findings of the basic facts upon which the expressed ultimate fact must be supported." As this Court explained in *Capital Transit Co. v. PUC*, 93 U. S. App. D. C. 194, 213 F.2d 176, 187, *cert. denied*, 348 U. S. 816 (1954), the decisions require "basic findings supported by evidence and ultimate findings which flow rationally from the basic findings." See also, *FTC v. B. F. Goodrich Company*, 100 U. S. App. D. C. 58, 242 F.2d 31 (1957); *West Michigan Telecasters, Inc. v. FCC*, 96 Wash. L. R. 1045 (U. S. App. D. C. 1968).

It will be shown in the discussion which follows that it cannot be determined from the order establishing Federal Motor Vehicle Safety Standard No. 202 whether the order complies with the standards and limitations imposed by the National Traffic & Motor Vehicle Safety Act. Under these circumstances, the order "cannot be upheld merely because findings might have been made and considerations disclosed which would justify [the] order as an appropriate safeguard for the interests

protected by the Act." *SEC v. Chenery Corp.*, 318 U. S. 80, 94 (1943). "There must be such a responsible finding." *Ibid.* See also, *Burlington Truck Lines v. United States*, 371 U. S. 156 (1962); *United States v. Baltimore & Ohio Railroad Co.*, 293 U. S. 454 (1935); *Radio Station KFH Co. v. FCC*, 101 U. S. App. D. C. 164, 247 F.2d 570 (1957); *NLRB v. Capital Transit Co.*, 95 U. S. App. D. C. 310, 221 F.2d 864, 867 (1955); *Twin City Milk Producers Ass'n. v. McNutt*, 122 F.2d 564 (8th Cir. 1941).

In the *Burlington* case, *supra*, the Supreme Court had before it a decision of the ICC granting an application for common carrier authority to a new trucking company to provide service in an area in which previously certified companies were refusing to make deliveries because of a union's secondary boycott. The ICC could have met the problem of assuring adequate service in the area either by issuing orders to the existing carriers requiring them to cease and desist from their refusals to provide service in the area, or, as it did, by granting the application for additional common carrier service to a new carrier. The ICC in its decision concluded that "the fact that such other remedies are available . . . does not alter the right to follow the course here chosen." The Supreme Court rejected this view and held that the action of the Commission could not be sustained because of the agency's failure to make findings which would justify its choice of remedy. In the language of the Court's opinion:

> "The Commission must exercise its discretion . . . within the bounds expressed by the standards of public convenience and necessity. . . . And for the courts to determine whether the agency *has* done so, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' . . . The agency must make findings to support its decision, and these findings must be supported by substantial evidence. Here, the Commission made no findings specifically directed to the choice between two vastly different remedies with vastly different consequences to the carriers and the public. Nor did it articulate any rational connection between the facts found and the choice made." *Id.*, 371 U. S. at 167-68.

In *United States v. Baltimore & Ohio Railroad Co.,* 293 U. S. 454 (1935), the Supreme Court had before it an order of the Interstate Commerce Commission amending an ICC rule so as to make the use of power reverse gears on steam locomotives mandatory rather than optional. The Court's opinion concedes that the ICC has authority "in an appropriate proceeding," to require the installation of power operated reverse gear but concludes that: "to support the order, certain basic findings are essential; . . . these were not made; and . . . hence the order is void." *Id.,* 293 U. S. at 462.

The Court explains in its opinion that the ICC does not have authority to require such devices as in its discretion it deems desirable, but only such as are required to remove "unnecessary peril to life and limb." While the power to make that determination is vested in the Commission: "its finding to that effect is essential to the existence of authority to promulgate the rule; and as Congress has made affirmative orders of the Commission subject to judicial review . . . the order may be set aside unless it appears that the basic finding was made."

It is not enough, as the opinion notes, that the Commission's decision discusses "at some length, the alleged advantages and disadvantages of the two classes of reverse gear and the expense which the proposed change would entail" and "concludes with 'findings' that, to a certain extent, the change should be made." The deficiency in the Commission's report, the Supreme Court holds, is that the issue of "whether the use of any or all types of steam locomotives 'equipped with hand reverse gear as compared with power reverse gear causes unnecessary peril to life or limb,' is left entirely to inference." This complete absence of the basic or essential findings required to support the Commission's order, the Supreme Court concludes, "renders it void." *Id.,* 293 U. S. at 463-464.

In *Radio Station KFH Co. v. FCC,* 101 U. S. App. D. C. 164, 247 F.2d 570 (1957), the FCC in its decision recited that it had examined each of the parties' exceptions and "those that have been granted, either in whole or in part, are reflected in the following changes or modifications of the Initial Decision; the others,

or the portions not so granted, are denied either for reasons set out in the decision, or as contrary to the record, or as requesting the inclusion of material already adequately reflected by the decision, or as lacking in the specificity required . . . or as having no decisional significance here." This Court held this "statement of reasons" for the Commission's decision inadequate. It pointed out "that the parties and the Court should not be left to guess with respect to any material issue, or to any group of minor matters that may have cumulative significance, which of several alternatives the Commission had in mind. It should make the basis for its action reasonably clear. We cannot find that it did so here. Its statement of reasons comes to little more than this: For one reason or another, all the exceptions not granted are overruled."

In *Twin City Milk Producers Ass'n. v. McNutt,* 122 F.2d 564 (8th Cir. 1941), the Court had before it an agency regulation fixing a definition and standard of identify for "dried skim milk" as human food. The statute authorized the agency to promulgate such regulations whenever in its judgment "such action will promote honesty and fair dealing in the interests of consumers." The Court, in refusing to uphold the regulation, explains that: "where a court is charged with the duty of reviewing the validity of an administrative agency's order, it has, up to the present time at least, refused the stamp of judicial approval, unless the order affirmatively demonstrated a compliance with all express and implied conditions underlying the exercise of the power." *Id.,* 122 F.2d at 566. Since the regulation in the *Twin City* case did not indicate whether the agency's decision was based on the statutory standard, the Court held that it was defective.

Where, as in this case, no "ultimate," "basic," or "subsidiary" findings are made by the agency in support of its order, the order cannot be sustained on judicial review no matter how inventive the Department of Justice may be in formulating "post hoc rationalizations" for the agency's action. *Burlington Truck Lines, supra,* 371 U. S. at 168. It is a "simple but fundamental rule of administrative law . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action

solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action." *SEC v. Chenery Corp.*, 332 U. S. 194, 196 (1947) and cases cited, *supra.*

B. Respondents' Order Does Not Contain The Responsible Findings Essential To Its Validity.

Respondents failed in several respects to make the "responsible" findings necessary under these precedents to give validity to the order establishing Federal Motor Vehicle Safety Standard No. 202.

Section 103(f) of the National Traffic & Motor Vehicle Safety Act (15 U.S.C., §1392(f)), requires that in prescribing standards, the Secretary shall:

> "(1) consider relevant available motor vehicle safety data, including the results of research, development, testing and evaluation activities conducted pursuant to this Act; (2) consult with the Vehicle Equipment Safety Commission, and such other state or interstate agencies (including legislative committees) as he deems appropriate; (3) consider whether such proposed standard is reasonable, practicable and appropriate for the particular type of motor vehicle or item of motor equipment for which it is prescribed; and (4) consider the extent to which such standards will contribute to carrying out the purposes of this Act."

In addition, section 103(a) of the Act (15 U.S.C., §1392(a)), requires that each Federal motor vehicle safety standard "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms." Section 102(1) of the Act (15 U.S.C., §1391(1)) defines "motor vehicle safety" to mean "the performance of motor vehicles or motor vehicle equipment in such a manner that the public is protected against unreasonable risk of death or injury to persons in the event accidents do occur, and includes non-operational safety of such vehicles." Also pertinent is the definition in section 102(2) of the Act (15 U.S.C., §1391(2)) of "motor vehicle safety standards" to mean "a minimum standard for

motor vehicle performance, or motor vehicle equipment performance, which is practicable, which meets the needs for motor vehicle safety and which provides objective criteria."

There are several comments in the House and Senate Reports explaining these statutory criteria. These comments recognize that standards "cannot be set in a vacuum" but "must be based on reliable information and research." H. Rep. No. 1776, 89th Cong., 2d Sess., p. 11. The legislation authorized extensive research into auto safety problems and the Secretary was expected to give consideration "to relevant available safety data and the results or research, development, testing, and evaluation conducted pursuant to this Act." *Id.* at p. 18. The House Report explained that the language specifying that each Federal standard must be "practicable," "appropriate," and "objective," would require "consideration of all relevant factors, including technological ability to achieve the goal of a particular standard as well as consideration of economic factors." *Ibid.*

The Senate Report stressed that "vigorous competition in the development and marketing of safety improvements must be maintained." S. Rep. No. 1301, 89th Cong., 2d Sess., p. 4. The Senate Report, like the House Report, also indicates that in establishing standards, the Secretary will "necessarily consider" such factors as whether a standard is "likely to stifle innovation," "reasonableness of cost," "feasibility," "lead time," and "desirability of giving consumers wide range of choices in the selection of motor vehicles." *Ibid.* In explaining the provisions requiring that standards specify minimum safe performance requirements "but not the manner in which the manufacturer is to achieve the specified performance," the Senate Report states that the purpose of specifying such "performance" standards rather than "design" standards is to assure that "manufacturers and parts suppliers will then be free to compete in developing and selecting devices and structures that can meet or surpass the performance standards." *Id.* at p. 6.

These statutory provisions do not confer upon Respondents authority to establish such standards as they in their discretion deem desirable, but only such standards that will protect the public against "unreasonable risk" of death or injury. Furthermore, they do not authorize Respondents to establish such standards as they in their discretion deem desirable to protect the public against such "unreasonable risks," but only such standards as are "reasonable, practicable and appropriate for the particular type of motor vehicle or motor vehicle equipment for which it is prescribed," as those terms are defined and explained.

As a matter of fact, as discussed below, a considerable amount of evidence and material was submitted in the course of the Administrative proceedings suggesting that a head restraint standard was not needed to protect the public against "unreasonable risk" of injury, that head restraints could increase safety hazards for individual drivers and passengers, that any standard with regard to head restraints should continue to make their use optional, and that there was a lack of reliable information with regard to the entire subject matter.

Furthermore, as noted in the Statement of the Case, Petitioners raised particular objection to any requirement that the head restraint be factory installed by new car manufacturers. They pointed out that "members of the automotive aftermarket industry have produced millions of head restraints for sale to new and used car buyers without prodding from the Federal Government"; that "such companies are in a position to adapt their production to any Federal safety standards which may be promulgated"; that "experience suggests that they can supply such equipment to consumers more promptly and at less cost than the new car manufacturers"; and that "the installation of head restraints is a relatively simple and inexpensive matter and there is no compelling reason for requiring this new item of equipment to be factory installed."

Petitioners also contended in the administrative proceeding that while a particular safety standard because of its nature may require incorporation in the manufacture of the motor vehicle, any such conclusion "must be based upon evidence and findings and not upon conjecture and assumptions." They argued that "there must be a strong presumption under the Act against any action which would preclude independent manufacturers and retailers from continuing to produce and sell for installation on new cars specific items of motor vehicle equipment which satisfy or exceed Federal safety standards" and urged that "the burden of proof in every case must be borne by those who would restrict consumer choice, discourage further improvement and innovation, delay implementation of needed changes, increase prices and curb competition." Petitioners pointed out that "experience demonstrates that these are the consequences of relying solely on new-car manufacturers for compliance with Federal safety standards and it is clearly the intent of Congress that such consequences be avoided whenever possible."

The record also contains numerous references to potential safety hazards associated with head restraints and a number of comments urging either an optional equipment standard or a delay in the adoption of any standard. For example, Ford Motor Company, in its comments, stated that "Because they reduce the field of rearward and side vision of a substantial percentage of drivers, Ford believes that all of its customers should not be required to accept and pay for these devices. We simply cannot guarantee that customers of varying sizes and shapes will, on balance, receive value from these devices in the form of a personal protection. . . ." (R. 347-348) General Motors, in its comments, stated that "drivers following behind a car with headrests will have increased difficulty in seeing through the vehicle ahead." (R. 386) The FIAT comment noted the following drawbacks: "Reduction in rearward vision, reduction in forward vision for rear seat occupants (which can induce sickness in persons sensitive to car sickness who, in these cases, have sometimes such reactions as to cause prejudice to safety), in addition to the fact of favoring drowsiness of a tired driver." (R. 454) FIAT concluded that "these drawbacks are directly connected with safety and we would present that an order of this kind would prove harmful rather than advantageous." (R. 454) Another comment submitted by the California Highway Patrol stated that head restraints in small cars would prevent a mother in the front seat from having "access to the rear seat to reach a small child correctly fastened in a seat belt." (R. 474) The Chrysler Corporation, which stated that it has been offering head restraints as optional equipment, pointed out that many drivers have a "strong aversion to head restraints . . . not only because of the vision restrictions, but also because of a strong emotional claustrophobic type of reaction which in the past has resulted in many people removing them from their cars and vehemently insisting they would not tolerate them." (R. 683) The Ford Motor Company also stated that: "Because a number of persons would object to having head rests in their cars, it seems reasonable to expect that a substantial number will simply remove the applicance if it is forced on them," and that: "This would leave certain mounting hardware normally protected by the head rest exposed, and subject rear seat occupants to unnecessary hazards." (R. 348)

The Court will search in vain for any findings or reasons or analysis in Respondents' order which would justify rejection of these contentions, or suggest that they were given proper consideration, or otherwise demonstrate that Respondents complied with the criteria in the enabling statute. There is no indication in Respondents' order that Respondents' based the order on "reliable information and research," or weighed "technological" and "economic factors," or considered whether the order is "likely to stifle innovation," or result in unreasonable costs to the public, or preserve some range of "choice" to consumers. Nor is there any indication that Respondents attempted to comply with the intent of Congress that "vigorous competition in the development and marketing of safety improvements must be maintained" and that "manufacturers and parts suppliers will . . . be free to compete in developing and selecting devices and structures than can meet or surpass the performance standards." It has been shown that these were the essential factors embraced within the statutory criteria, yet, none of them are discussed in the order. Indeed, there are not in this order even the ultimate findings that the order will protect the public against "unreasonable risks" and is "reasonable, practicable and appropriate for the particular type of motor vehicle or item of motor vehicle equipment for which it is prescribed."

Furthermore, even if the statutory criteria had been met, the Act provides a choice of remedies and the *Burlington* case, *supra,* holds that under such circumstances, the agency's decision must rest on "findings specifically directed" to the choice of remedies it has prescribed.[4] It is not enough, as that case establishes,

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[4] As Petitioner pointed out during the administrative proceedings: "Numerous provisions of the Act make it clear that safety standards may be made applicable either to motor vehicles *or* to specific items of motor vehicle equipment. For example, section 102(2) of the Act defines 'motor vehicle safety standards' to mean a 'minimum standard for motor vehicle performance, or motor vehicle equipment performance, which is practicable, which meets the needs for motor vehicle safety and which provides objective criteria.' Similarly, section 103(f) of the Act requires that the agency consider whether a proposed standard is reasonable, practicable and appropriate for the 'particular type of motor vehicle or item of motor vehicle equipment' for which it is prescribed and the extent to which such standard will contribute to carrying out the purposes of the

(Continued)

that there may be an independent basis for its decision; the agency must show why it selected the remedy chosen over other remedies which were available to it to achieve the objectives of the law.

Respondents, despite the teaching of such cases, failed to make any such findings or offer reasons for their action sufficient under the law. Their order, like their Rules of Procedure, has a tone of omniscience rather than of reasoned judgment. In both instances, Respondents appear to have ignored the limitations and guidelines imposed in the Act on the formulation of standards which will meet the needs for motor vehicle safety in the manner Congress has prescribed. As a leading commentator has stated: "One of the best procedural protections against arbitrary exercise of discretionary power lies in the requirement of findings and reasons that appear to reviewing judges to be rational." Davis, *Administrative Law Treatise,* 16.12 (1965 Supp.) Having failed to provide such findings and reasons in this case, Respondents cannot ask the Court to sustain their decision. *West Michigan Telecasters, Inc. v. FCC,* 96 Wash. L. R. 1045 (U. S. App. D. C. 1968).

Respondents Arbitrarily Requested the Petitions for Reconsideration filed by Petitioners.

Since the requisite findings have not been made, Respondents' order is invalid and the Court cannot determine in this proceeding whether such findings as might have been made would be supported by substantial evidence. *NLRB v. Capital Transit Co.,* 95 U. S. App. D. C. 310, 221 F.2d 864, 867 (1955); *Boudin v. Dulles,* 98 U. S. App. D. C. 305, 235 F.2d 532, 535 (1956); *Democrat Printing Co. v. FCC,* 91 U. S. App. D. C. 72, 78, 202 F.2d 298, 303 (1952) and cases there cited.

(Footnote continued from preceding page)

Act. In the same vein, section 114 of the Act expressly provides for different methods of certification of motor vehicles and items of motor vehicle equipment, permitting in the latter case a label or tag on the specific item of equipment rather than on the motor vehicle itself." (R. 933)

Nevertheless, some additional reference to the evidence is appropriate in view of comments made by the Federal Highway Administrator in rejecting the Petition for Reconsideration after the filing of the Petitions for Review in this case.

The Administrator's letter rejecting the Petition for Reconsideration (R. 1225-27) states that the "gist" of Petitioners' argument appears to be that because the Administration has elected to require a head restraint-seat system . . . your competitive position has been injured with respect to head restraint devices" and that Petitioners "would have us make the matter of affording this kind of protection optional with the purchaser of the vehicles in order to preserve a part of your business." These assertions do not have any basis in the Petition for Reconsideration or other comments filed by Petitioners. Petitioners, unlike the Administrator, did rely on the statutory criteria requiring consideration of competitive factors in the interests of an effective safety program, and this was wholly proper. There is no justification for the Administrator's implication that Petitioners would be opposed to the standard even if it satisfied the statute "in order to preserve a part of [their] business."

The Administrator also stated in rejecting the Petition for Reconsideration that:

> "A head restraint standard promulgated as an equipment standard would not result in all passenger cars being equipped with head restraints on or after the effective date of the standard, but instead would make available head restraints that meet a standard which could be installed in vehicles if vehicle owners, at their option, so desired. This would therefore not meet the need for safety."

We have already pointed out that the Act expressly authorizes standards to be issued either for specific items of motor vehicle equipment or for motor vehicles and that under such circumstances, Respondents must make findings to justify the choice made. In addition, it must now be noted that the substantial evidence in the whole record does not support the Administrator's contention that an equipment standard would "not meet the need for safety."

The Administrator also stated that "the performance of a head restraint system is dependent upon the interrelation between the head restraint, the structure of the seat and the seat anchorage." This statement is noteworthy since it will be recalled that the Advance Notice of Proposed Rule Making with regard to the head restraint standard invited persons to comment on the possibility of amending several specifically identified standards "so as to incorporate head restraint requirements within a single unified system of occupant seating and restraint arrangements." However, the fact is that there is nothing in Federal Motor Vehicle Safety Standard No. 202 which would incorporate head restraint requirements "within a single unified system of occupant seating and restraint arrangements." In view of this fact, the Administrator's statement is incomprehensible and on its face is contrary to whatever evidence he may have relied upon in establishing an order which did not incorporate head restraints "within a single unified system of occupant seating and restraint arrangements."

The Administrator also stated that:

> "An equipment standard in lieu of a vehicle performance standard would result in a restriction of design that would dictate that head restraints be added on equipment without allowing other design options such as making the head restraint an integral part of the seat."

This statement also is incomprehensible since the order permits either add-on or integral head restraint arrangements, and an equipment standard could permit the identical "design options." There is no more basis for suggesting that an equipment standard would preclude an integral head restraint, than there is for suggesting that a motor vehicle standard precludes an add-on head restraint. If the Administrator's statement is supposed to be based on evidence that an equipment standard would preclude making "the head restraint an integral part of the seat" the short answer is that there is no such substantial evidence in this record.

The Administrator also stated that Petitioners were arguing "that it would be possible for the Administrator to amend Standard No. 202 so as to make it applicable to equipment rather than to vehicles and then to require purchasers of vehicles to install such equipment." The Administrator concluded that the Petitioners "misunderstood the legal authority of the Administrator under the Act" and that the "Administrator does not have such legal authority."

What Petitioners actually suggested was that one alternative "to factory-installation of safety equipment by new car manufacturers is to permit consumers to select for installation the particular head restraint which best suits their needs from among competing brands certified to be in compliance with the standard." (R. 935)[5]

The Administrator appears to have misinterpreted both the suggestion made by Petitioners and the agency's legal authority under the Act. Apparently, the Administrator views section 108 of the Act (15 U.S.C., §1397), which relates to sanctions, as requiring implementation of all Federal safety standards by factory-installation of any equipment covered by such standards. However, it is section 103 of the Act (15 U.S.C., §1392) which sets forth the criteria for the establishment of standards, not section 108. If a standard does not satisfy these criteria, as in this case, the

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[5] In support of this alternative, Petitioners pointed out that:

> "There is nothing unprecedented or unusual about the procedure requested by petitioners. It is common practice for the new car buyer to be offered many options in buying a new car. He may chose from a variety of superhorsepower engines, body styles and colors. He can even select premium tires rather than tires meeting minimum Federal requirements. Of course, his car must have an engine, a style, a color and tires. When the standard for head restraints becomes effective, the car will also have to have this equipment. The consumer would not be able to obtain delivery of his car without the head restraint, but it would be within his good judgment as to which of the many qualified and certified head restraints would be installed. There is no reason why the public should not be offered the same kind of options with regard to safety equipment (all of which would have to comply with Federal standards) as they now are offered with regard to items of equipment and accessories not related to safety. To the extent there are any differences, they serve to confirm rather than to undermine the desirability of giving consumers an effective choice in selecting in a competitive market the safety equipment which will best meet their specific needs." (R. 934)

standard is invalid whether or not compliance is enforced by requiring factory-installation. In either case, anyone who complied with the standard in whatever manner the standard specified would not be violating section 108 of the Act. Section 103 of the Act certainly provides ample legal authority for the agency after appropriate proceedings and on the basis of the necessary findings and evidence to consider the alternative to factory-installation suggested by Petitioners.

The Administrator also stated that:

> "In addition, it is determined that an earlier effective date of Standard No. 202 would not be reasonable or practicable for Standard No. 202 in its present form; and that a revision of Standard No. 202 to make such an effective date possible, such as your request that head restraints be optional add-on equipment, would result in a substantial reduction in the protection afforded the public."

There is no basis in the record for these statements and they are without foundation. In actual fact, the evidence in the record showing that members of the automotive aftermarket industry represented by the Automotive Parts & Accessories Association have produced millions of head restraints for sale to new and used-car owners and are in a position to make such safety equipment available to the public at less cost than new-car manufacturers, and at a much earlier date than that provided in Respondents' order is uncontradicted. (R. 142-144, 450-452, 460-463, 484-492, 627-628) This evidence also shows that Respondents' order will be of absolutely no benefit to some 80,000,000 owners of used cars and their passengers. Finally, it shows that independent manufacturers can produce head restraints which will satisfy the technical requirements of Standard No. 202.

The Administrator ignored or arbitrarily rejected such evidence in requiring that head restraints be installed by new car manufacturers and postponing until at least January 1, 1969 time for compliance. In view of the procedures followed by Respondents, the Administrator may have been totally unaware of this evidence. In any event, the inevitable result of the Administrator's order will be to encourage production of

head restraints under the minimum performance standards specified, to foster monopolistic conditions in the automotive industry, to deprive consumers of any choice of equipment, to impose upon consumers higher prices than would be charged in a competitive market, to discourage further improvement or innovation, and to delay the effective date of this safety advance.

Congress did not believe that such consequences would help promote an effective safety program. If the Administrator disagrees, his remedy is to ask for a change in the law, not to ignore it. Respondents cannot, on the record in this proceeding and the requirements now in the law, justify a regulation which will effectively exclude independent manufacturers and retailers of head restraints from a market they developed and served for years without any Federal prodding and without any assistance from the Nation's giant auto workers.

Finally, as has been noted, there is evidence in this record that primarily because of the method chosen by the Administrator for its implementation, the order under review may expose some members of the public to new hazards to their safety. See p. 38, *supra*. The Administrator has prescribed standards for average-sized drivers and passengers and has set the standards to the lowest common demoninator to permit factory-installation. As has been discussed, under this order the risk of injury to some drivers or passengers could be increased by a factory-installed head restraint which complied with the standard but which was not at all suited to the individual's dimensions and safety needs.

It is unfortunate that the Administrator, in denying the Petition for Reconsideration, would attempt to discredit Petitioners' motives and make statements either without any evidentiary support or contrary to such evidence as existed. These statements are not justified by the record and would not have been made if the record had been subjected to careful analysis prior to establishment of the order. This serves to illustrate the theme that permeates the case law on this subject, namely, that procedural safeguards are essential to assure fair treatment and fair decisions in the administrative process.

CONCLUSION

WHEREFORE, it is submitted that the order establishing Federal Motor Vehicle Safety Standard No. 202 be declared a nullity and be set aside.

Milton Eisenberg
1700 K Street, N. W.
Washington, D. C. 20006
Attorney for Petitioners

Of Counsel:
STRASSER, SPIEGELBERG, FRIED,
FRANK & KAMPELMAN
JAMES B. BLINKOFF

CONCLUSION

WHEREFORE, it is submitted that the order establishing Federal Motor Vehicle Safety Standard No. 202 be declared a nullity and be set aside.

Milton Eisenberg
1700 K Street, N. W.
Washington, D. C. 20006
Attorney for Petitioners

Of Counsel:
STRASSER, SPIEGELBERG, FRIED,
FRANK & KAMPELMAN
JAMES B. BLINKOFF

APPENDIX TO BRIEF

(Statutes, orders, rules and regulations involved)

I. The relevant provisions of the National Traffic and Motor Vehicle Safety Act (P.L. 89-563, 80 Stat. 718, 15 U.S.C. § 1381 *et seq.*). (References in margins refer to sections of P.L. 89-563; text is taken from 15 U.S.C. § 1381 *et seq.*):

Section 1

§ 1381. Congressional declaration of purpose

Congress hereby declares that the purpose of this chapter is to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents. Therefore, Congress determines that it is necessary to establish motor vehicle safety standards for motor vehicles and equipment in interstate commerce; to undertake and support necessary safety research and development; and to expand the national driver register. Pub. L. 89-563, § 1, Sept. 9, 1966, 80 Stat. 718.

Section 102

§ 1391. Definitions

As used in this subchapter –

(1) "Motor vehicle safety" means the performance of motor vehicles or motor vehicle equipment in such a manner that the public is protected against unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles and is also protected against unreasonable risk of death or injury to persons in the event accidents do occur, and includes nonoperational safety of such vehicles.

(2) "Motor vehicle safety standards" means a minimum standard for motor vehicle performance, or motor vehicle equipment performance, which is practicable, which meets the need for motor vehicle safety and which provides objective criteria.

(3) "Motor vehicle" means any vehicle driven or drawn by mechanical power manufactured primarily for use on the public streets, roads, and highways, except any vehicle operated exclusively on a rail or rails.

(4) "Motor vehicle equipment" means any system, part, or component of a motor vehicle as originally manufactured or any similar part or component manufactured or sold for replacement or improvement of such system, part, or component or as an accessory, or addition to the motor vehicle.

(5) "Manufacturer" means any person engaged in the manufacturing or assembling of motor vehicles or motor vehicle equipment, including any person importing motor vehicles or motor vehicle equipment for resale.

(6) "Distributor" means any person primarily engaged in the sale and distribution of motor vehicles or motor vehicle equipment for resale.

(7) "Dealer" means any person who is engaged in the sale and distribution of new motor vehicles or motor vehicle equipment primarily to purchasers who in good faith purchase any such vehicle or equipment for purposes other than resale.

(8) "State" includes each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, the Canal Zone, and American Samoa.

(9) "Interstate commerce" means commerce between any place in a State and any place in another State, or between places in the same State through another State.

(10) "Secretary" means Secretary of Commerce.

(11) "Defect" includes any defect in performance, construction, components, or materials in motor vehicles or motor vehicle equipment.

(12) "United States district courts" means the Federal district courts of the United States and the United States courts of the Commonwealth of Puerto Rico, Guam, the Virgin Islands, the Canal Zone, and American Samoa.

(13) "Vehicle Equipment Safety Commission" means the Commission established pursuant to the joint resolution of the Congress relating to highway traffic safety, approved August 20, 1958

(72 Stat. 635), or as it may be hereafter reconstituted by law. Pub. L. 89-563, Title I, § 102, Sept. 9, 1966, 80 Stat. 718.

Section 103

§ 1392. Motor vehicle safety standards – Establishment

(a) The Secretary shall establish by order appropriate Federal motor vehicle safety standards. Each such Federal motor vehicle safety standard shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms.

(b) The Administrative Procedure Act shall apply to all orders establishing, amending, or revoking a Federal motor vehicle safety standard under this subchapter.

(c) Each order establishing a Federal motor vehicle safety standard shall specify the date such standard is to take effect which shall not be sooner than one hundred and eighty days or later than one year from the date such order is issued, unless the Secretary finds, for good cause shown, that an earlier or later effective date is in the public interest, and publishes his reasons for such finding.

(d) Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

(e) The Secretary may by order amend or revoke any Federal motor vehicle safety standard established under this section. Such order shall specify the date on which such amendment or revocation is to take effect which shall not be sooner than one

hundred and eighty days or later than one year from the date the order is issued, unless the Secretary finds, for good cause shown, than an earlier or later effective date is in the public interest, and publishes his reasons for such finding.

(f) In prescribing standards under this section, the Secretary shall –

(1) consider relevant available motor vehicle safety data, including the results of research, development, testing and evaluation activities conducted pursuant to this chapter;

(2) consult with the Vehicle Equipment Safety Commission, and such other State or interstate agencies (including legislative committees) as he deems appropriate;

(3) consider whether any such proposed standard is reasonable, practicable and appropriate for the particular type of motor vehicle or item of motor vehicle equipment for which it is prescribed; and

(4) consider the extent to which such standards will contribute to carrying out the purposes of this chapter.

(g) In prescribing safety regulations covering motor vehicles subject to part II of the Interstate Commerce Act, as amended, or the Transportation of Explosives Act as amended, the Interstate Commerce Commission shall not adopt or continue in effect any safety regulation which differs from a motor vehicle safety standard issued by the Secretary under this subchapter, except that nothing in this subsection shall be deemed to prohibit the Interstate Commerce Commission from prescribing for any motor vehicle operated by a carrier subject to regulation under either or both of such Acts, a safety regulation which imposes a higher standard of performance subsequent to its manufacture than that required to comply with the applicable Federal standard at the time of manufacture.

(h) The Secretary shall issue initial Federal motor vehicle safety standards based upon existing safety standards on or before January 31, 1967. On or before January 31, 1968, the Secretary shall issue new and revised Federal motor vehicle safety standards under this subchapter.

Section 104

§ 1393. National Motor Vehicle Safety Advisory Council — Establishment; membership

(a) The Secretary shall establish a National Motor Vehicle Safety Advisory Council, a majority of which shall be representatives of the general public, including representatives of State and local governments, and the remainder shall include representatives of motor vehicle manufacturers, motor vehicle equipment manufacturers, and motor vehicle dealers.

Consultation with Secretary of Commerce

(b) The Secretary shall consult with the Advisory Council on motor vehicle safety standards under this chapter.

Compensation of members; travel expenses

(c) Members of the National Motor Vehicle Safety Advisory Council may be compensated at a rate not to exceed $100 per diem (including travel time) when engaged in the actual duties of the Advisory Council. Such members, while away from their homes or regular places of business, may be allowed travel expenses, including per diem in lieu of subsistence as authorized by section 73b–2 of Title 5, for persons in the Government service employed intermittently. Payments under this section shall not render members of the Advisory Council employees or officials of the United States for any purpose.

Section 105

§ 1394. Judicial review of orders establishing standards;

(a) (1) In a case of actual controversy as to the validity of any order under section 1392 of this title, any person who will be adversely affected by such order when it is effective may at any time prior to the sixtieth day after such order is issued file a petition with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary or other officer designated by him for that purpose. The Secretary thereupon shall file in the court the record of the proceedings on which the Secretary based his order, as provided in section 2112 of Title 28.

(2) If the petitioner applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Secretary, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Secretary, and to be adduced upon the hearing, in such manner and upon such terms and conditions as to the court may seem proper. The Secretary may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken, and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original order, with the return of such additional evidence.

(3) Upon the filing of the petition referred to in paragraph (1) of this subsection, the court shall have jurisdiction to review the order in accordance with section 1009 of Title 5 and to grant appropriate relief as provided in such section.

(4) The judgment of the court affirming or setting aside, in whole or in part, any such order of the Secretary shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(5) Any action instituted under this subsection shall survive, notwithstanding any change in the person occupying the office of Secretary of any vacancy in such office.

(6) The remedies provided for in this subsection shall be in addition to and not in substitution for any other remedies provided by law.

(b) A certified copy of the transcript of the record and proceedings under this section shall be furnished by the Secretary to any interested party at his request, and payment of the costs thereof, and shall be admissible in any criminal, exclusion of imports, or other proceeding arising under or in respect of this subchapter, irrespective of whether proceedings with respect to the order have previously been initiated or become final under subsection (a) of this section.

Section 106

§ 1395. Research, testing, development, and training in traffic and vehicle safety – Scope of research.

(a) The Secretary shall conduct research, testing, development, and training necessary to carry out the purposes of this subchapter, including, but not limited to –

(1) collecting data from any source for the purpose of determining the relationship between motor vehicle or motor vehicle equipment performance characteristics and (A) accidents involving motor vehicles, and (B) the occurrence of death, or personal injury resulting from such accidents;

(2) procuring (by negotiation or otherwise) experimental and other motor vehicles or motor vehicle equipment for research and testing purposes;

(3) selling or otherwise disposing of test motor vehicles and motor vehicle equipment and reimbursing the proceeds of such sale or disposal into the current appropriation available for the purpose of carrying out this subchapter.

(b) The Secretary is authorized to conduct research, testing, development, and training as authorized to be carried out by subsection (a) of this section by making grants for the conduct of such research, testing, development, and training to States, interstate agencies, and nonprofit institutions.

(c) Whenever the Federal contribution for any research or development activity authorized by this chapter encouraging motor vehicle safety is more than minimal, the Secretary shall include in any contract, grant, or other arrangement for such research or development activity, provisions effective to insure that all information, uses, processes, patents, and other developments resulting from that activity will be made freely and fully available to the general public. Nothing herein shall be construed to deprive the owner of any background patent of any right which he may have thereunder.

Section 107

§ 1396. Cooperation of Secretary with governmental and private agencies in developing standards

The Secretary is authorized to advise, assist, and cooperate with, other Federal departments and agencies, and State and other interested public and private agencies, in the planning and development of –

(1) motor vehicle safety standards;

(2) methods for inspecting and testing to determine compliance with motor vehicle safety standards.

Section 108

§ 1397. Prohibition against manufacture, sale, delivery, or importation of substandard vehicles –

(a) No person shall –

(1) manufacture for sale, sell, offer for sale, or introduce or deliver for introduction in interstate commerce, or import into the United States, any motor vehicle or item of motor vehicle equipment manufactured on or after the date any applicable Federal motor vehicle safety standard takes effect under this subchapter unless it is in conformity with such standard except as provided in subsection (b) of this section;

(2) fail or refuse access to or copying of records, or fail to make reports or provide information, or fail or refuse to permit entry or inspection, as required under section 1401 of this title;

(3) fail to issue a certificate required by section 1403 of this title, or issue a certificate to the effect that a motor vehicle or item of motor vehicle equipment conforms to all applicable Federal motor vehicle safety standards, if such person in the exercise of due care has reason to know that such certificate is false or misleading in a material respect;

(4) fail to furnish notification of any defect as required by section 1402 of this title.

(b) (1) Paragraph (1) of subsection (a) of this section shall not apply to the sale, the offer for sale, or the introduction or delivery for introduction in interstate commerce of any motor vehicle or motor vehicle equipment after the first purchase of it in good faith for purposes other than resale. In order to assure a continuing

and effective national traffic safety program, it is the policy of Congress to encourage and strengthen the enforcement of State inspection of used motor vehicles. Therefore to that end the Secretary shall conduct a thorough study and investigation to determine the adequacy of motor vehicle safety standards and motor vehicle inspection requirements and procedures applicable to used motor vehicles in each State, and the effect of programs authorized by this subchapter upon such standards, requirements, and procedures for used motor vehicles, and report to Congress as soon as practicable but not later than September 9, 1967, the results of such study, and recommendations for such additional legislation as he deems necessary to carry out the purposes of this chapter. As soon as practicable after the submission of such report, but no later than one year from the date of submission of such report, the Secretary, after consultation with the Council and such interested public and private agencies and groups as he deems advisable, shall establish uniform Federal motor vehicle safety standards applicable to all used motor vehicles. Such standards shall be expressed in terms of motor vehicle safety performance. The Secretary is authorized to amend or revoke such standards pursuant to this chapter.

(2) Paragraph (1) of subsection (a) of this section shall not apply to any person who establishes that he did not have reason to know in the exercise of due care that such vehicle or item of motor vehicle equipment is not in conformity with applicable Federal motor vehicle safety standards, or to any person who, prior to such first purchase, holds a certificate issued by the manufacturer or importer of such motor vehicle or motor vehicle equipment, to the effect that such vehicle or equipment conforms to all applicable Federal motor vehicle safety standards, unless such person knows that such vehicle or equipment does not so conform.

(3) A motor vehicle or item of motor vehicle equipment offered for importation in violation of paragraph (1) of subsection (a) of this section shall be refused admission into the United States under joint regulations issued by the Secretary of the Treasury and the Secretary; except that the Secretary of the Treasury and the Secretary may, by such regulations, provide for authorizing the importation of such motor vehicle or item of motor vehicle equipment

into the United States upon such terms and conditions (including the furnishing of a bond) as may appear to them appropriate to insure that any such motor vehicle or item of motor vehicle equipment will be brought into conformity with any applicable Federal motor vehicle safety standard prescribed under this subchapter, or will be exported or abandoned to the United States.

(4) The Secretary of the Treasury and the Secretary may, by joint regulations, permit the temporary importation of any motor vehicle or item of motor vehicle equipment after the first purchase of it in good faith for purposes other than resale.

(5) Paragraph (1) of subsection (a) of this section shall not apply in the case of a motor vehicle or item of motor vehicle equipment intended solely for export, and so labeled or tagged on the vehicle or item itself and on the outside of the container, if any, which is exported.

(c) Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

Section 109

§ 1398. Civil penalties;

(a) Whoever violates any provision of section 1397 of this title, or any regulation issued thereunder, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. Such violation of a provision of section 1397 of this title, or regulations issued thereunder, shall constitute a separate violation with respect to each motor vehicle or item of motor vehicle equipment or with respect to each failure or refusal to allow or perform an act required thereby, except that the maximum civil penalty shall not exceed $400,000 for any related series of violations.

(b) Any such civil penalty may be compromised by the Secretary. In determining the amount of such penalty, or the amount agreed upon in compromise, the appropriateness of such penalty to

the size of the business of the person charged and the gravity of the violation shall be considered. The amount of such penalty, when finally determined, or the amount agreed upon in compromise, may be deducted from any sums owing by the United States to the person charged. Pub.L. 89-563, Title I, § 109, Sept. 9, 1966, 80 Stat. 723.

Section 110

§ 1399. Jurisdiction of United States District Court –

(a) The United States district courts shall have jurisdiction, for cause shown and subject to the provisions of rule 65(a) and (b) of the Federal Rules of Civil Procedure, to restrain violations of this subchapter, or to restrain the sale, offer for sale, or the introduction or delivery for introduction, in interstate commerce, or the importation into the United States, of any motor vehicle or item of motor vehicle equipment which is determined, prior to the first purchase of such vehicle in good faith for purposes other than resale, not to conform to applicable Federal motor vehicle safety standards prescribed pursuant to this subchapter, upon petition by the appropriate United States attorney or the Attorney General on behalf of the United States. Whenever practicable, the Secretary shall give notice to any person against whom an action for injunctive relief is contemplated and afford him an opportunity to present his views, and, except in the case of a knowing and willful violation, shall afford him reasonable opportunity to achieve compliance. The failure to give such notice and afford such opportunity shall not preclude the granting of appropriate relief.

Criminal contempt; trial by jury

(b) In any proceeding for criminal contempt for violation of an injunction or restraining order issued under this section, which violation also constitutes a violation of this subchapter, trial shall be by the court or, upon demand of the accused, by a jury. Such trial shall be conducted in accordance with the practice and procedure applicable in the case of proceedings subject to the provisions of rule 42(b) of the Federal Rules of Criminal Procedure.

Venue

(c) Actions under subsection (a) of this section and section 1398(a) of this title may be brought in the district wherein any act or transaction constituting the violation occurred, or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

Subpoenas

(d) In any actions brought under subsection (a) of this section and section 1398(a) of this title, subpoenas for witnesses who are required to attend a United States district court may run into any other district.

(e) It shall be the duty of every manufacturer offering a motor vehicle or item of motor vehicle equipment for importation into the United States to designate in writing an agent upon whom service of all administrative and judicial processes, notices, orders, decisions and requirements may be made for and on behalf of said manufacturer, and to file such designation with the Secretary, which designation may from time to time be changed by like writing, similarly filed. Service of all administrative and judicial processes, notices, orders, decisions and requirements may be made upon said manufacturer by service upon such designated agent at his office or usual place of residence with like effect as if made personally upon said manufacturer, and in default of such designation of such agent, service of process, notice, order, requirement or decision in any proceeding before the Secretary or in any judicial proceeding for enforcement of this subchapter or any standards prescribed pursuant to this subchapter may be made by posting such process, notice, order, requirement or decision in the Office of the Secretary.

Section 111

§ 1400. Noncompliance with safety standards – Repurchase from distributor or dealer of vehicle not meeting standards

(a) If any motor vehicle or item of motor vehicle equipment is determined not to conform to applicable Federal motor vehicle

safety standards, or contains a defect which relates to motor vehicle safety, after the sale of such vehicle or item of equipment by a manufacturer or a distributor to a distributor or a dealer and prior to the sale of such vehicle or item of equipment by such distributor or dealer:

(1) The manufacturer or distributor, as the case may be, shall immediately repurchase such vehicle or item of motor vehicle equipment from such distributor or dealer at the price paid by such distributor or dealer, plus all transportation charges involved and a reasonable reimbursement of not less than 1 per centum per month of such price paid prorated from the date of notice of such nonconformance to the date of repurchase by the manufacturer or distributor; or

(2) In the case of motor vehicles, the manufacturer or distributor, as the case may be, at his own expense, shall immediately furnish the purchasing distributor or dealer the required conforming part or parts or equipment for installation by the distributor or dealer on or in such vehicle and for the installation involved the manufacturer shall reimburse such distributor or dealer for the reasonable value of such installation plus a reasonable reimbursement of not less than 1 per centum per month of the manufactuer's or distributor's selling price prorated from the date of notice of such nonconformance to the date such vehicle is brought into conformance with applicable Federal standards: *Provided, however,* That the distributor or dealer proceeds with reasonable diligence with the installation after the required part, parts or equipment are received.

Civil action against manufacturer or distributor refusing to repurchase substandard vehicles; period of limitation

(b) In the event any manufacturer or distributor shall refuse to comply with the requirements of paragraphs (1) and (2) of subsection (a) of this section, then the distributor or dealer, as the case may be, to whom such nonconforming vehicle or equipment has been sold may bring suit against such manufacturer or

distributor in any district court of the United States in the district in which said manufacturer or distributor resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damage by him sustained, as well as all court costs plus reasonable attorneys' fees. Any action brought pursuant to this section shall be forever barred unless commenced within three years after the cause of action shall have accrued.

Determination of reimbursements for required installations

(c) The value of such installations and such reasonable reimbursements as specified in subsection (a) of this section shall be fixed by mutual agreement of the parties, or failing such agreement, by the court pursuant to the provisions of subsection (b) of this section. (Pub.L. 89-563, Title I, § 111, Sept. 9, 1966, 80 Stat. 724.)

Section 112

§ 1401. Inspection and investigation to enforce safety standards – Results of investigations given to Secretary of Treasury or Attorney General for action

(a) The Secretary is authorized to conduct such inspection and investigation as may be necessary to enforce Federal vehicle safety standards established under this subchapter. He shall furnish the Attorney General and, when appropriate, the Secretary of the Treasury any information obtained indicating noncompliance with such standards, for appropriate action.

Entry into factory, warehouse, or manufacturing establishment; reasonable inspection

(b) For purposes of enforcement of this subchapter, officers or employees duly designated by the Secretary, upon presenting appropriate credentials and a written notice to the owner, operator, or agent in charge, are authorized (1) to enter, at reasonable times, any factory, warehouse, or establishment in which motor vehicles or items of motor vehicle equipment are manufactured, or held for introduction into interstate commerce or are held for sale after such introduction; and (2) to inspect, at reasonable times and within reasonable limits

and in a reasonable manner, such factory, warehouse, or establishment. Each such inspection shall be commenced and completed with reasonable promptness.

Records, reports, and information from manufacturers; inspections and examination of relevant documents

(c) Every manufacturer of motor vehicles and motor vehicle equipment shall establish and maintain such reocrds, make such reports, and provide such information as the Secretary may reasonably require to enable him to determine whether such manufacturer has acted or is acting in compliance with this subchapter and motor vehicle safety standards prescribed pursuant to this subchapter and shall, upon request of an officer or employee duly designated by the Secretary, permit such officer or employee to inspect appropriate books, papers, records, and documents relevant to determining whether such manufacturer has acted or is acting in compliance with this subchapter and motor vehicle safety standards prescribed pursuant to this subchapter.

Performance and technical data; supplying of data to original purchaser

(d) Every manufacturer of motor vehicles and motor vehicle equipment shall provide to the Secretary such performance data and other technical data related to performance and safety as may be required to carry out the purposes of this chapter. The Secretary is authorized to require the manufacturer to give such notification of such performance and technical data at the time of original purchase to the first person who purchases a motor vehicle or item of equipment for purposes other than resale, as he determines necessary to carry out the purposes of this chapter.

(e) All information reported to or otherwise obtained by the Secretary or his representative pursuant to subsection (b) or (c) of this section which information contains or relates to a trade secret or other matter referred to in section 1905 of Title 18, shall be considered confidential for the purpose of that section, except that such information may be disclosed to other officers or employees concerned with carrying out this subchapter or when relevant in any proceeding under this subchapter. Nothing in this

section shall authorize the withholding of information by the Secretary or any officer or employee under his control, from the duly authorized committees of the Congress. Pub.L. 89-563, Title I, § 112, Sept. 9, 1966, 80 Stat. 725.

Section 113

§ 1402. Discovery of defects by manufacturer – Notice to purchaser

(a) Every manufacturer of motor vehicles shall furnish notification of any defect in any motor vehicle or motor vehicle equipment produced by such manufacturer which he determines, in good faith, relates to motor vehicle safety, to the purchaser (where known to the manufacturer) of such motor vehicle or motor vehicle equipment, within a reasonable time after such manufacturer has discovered such defect.

Notification by certified mail

(b) The notification required by subsection (a) of this section shall be accomplished –

(1) by certified mail to the first purchaser (not including any dealer of such manufacturer) of the motor vehicle or motor vehicle equipment containing such a defect, and to any subsequent purchaser to whom has been transferred any warranty on such motor vehicle or motor vehicle equipment; and

(2) by certified mail or other more expeditious means to the dealer or dealers of such manufacturer to whom such motor vehicle or equipment was delivered.

Form and requisites of notification

(c) The notification required by subsection (a) of this section shall contain a clear description of such defect, an evaluation of the risk to traffic safety reasonably related to such defect, and a statement of the measures to be taken to repair such defect.

Secretary's copy of all notices, bulletins, and communications sent by manufacturer to dealers and purchasers concerning defects; disclosure by Secretary

(d) Every manufacturer of motor vehicles shall furnish to the Secretary a true or representative copy of all notices, bulletins, and other communications to the dealers of such manufacturer or purchasers of motor vehicles or motor vehicle equipment of such manufacturer regarding any defect in such vehicle or equipment sold or serviced by such dealer. The Secretary shall disclose so much of the information contained in such notice or other information obtained under section 1401(a) of this title to the public as he deems will assist in carrying out the purposes of this chapter, but he shall not disclose any information which contains or relates to a trade secret or other matter referred to in section 1905 of Title 18 unless he determines that it is necessary to carry out the purposes of this chapter.

Notice by Secretary to manufacturer concerning defects relating to motor vehicle safety or failure to comply with safety standards; presentation of opposing views; notice to purchasers of defects

(e) If through testing, inspection, investigation, or research carried out pursuant to this subchapter, or examination of reports pursuant to subsection (d) of this section, or otherwise, the Secretary determines that any motor vehicle or item of motor vehicle equipment –

(1) does not comply with an applicable Federal motor vehicle safety standard prescribed pursuant to section 1392 of this title; or

(2) contains a defect which relates to motor vehicle safety;

then he shall immediately notify the manufacturer of such motor vehicle or item of motor vehicle equipment of such defect or failure to comply. The notice shall contain the findings of the Secretary and shall include all information upon which the findings are based. The Secretary shall afford such manufacturer an opportunity to present his views and evidence in support thereof, to establish that there is no failure of compliance or that the alleged defect does not affect motor vehicle safety. If after such

presentation by the manufacturer the Secretary determines that such vehicle or item of equipment does not comply with applicable Federal motor vehicle safety standards, or contains a defect which relates to motor vehicle safety, the Secretary shall direct the manufacturer to furnish the notification specified in subsection (c) of this section to the purchaser of such motor vehicle or item of motor vehicle equipment as provided in subsections (a) and (b) of this section. Pub. L. 89-563, Title I, § 113, Sept. 9, 1966, 80 Stat. 725.

Section 114

§ 1403. Certification of conformity with motor vehicle safety standards; form and placement of certification

Every manufacturer or distributor of a motor vehicle or motor vehicle equipment shall furnish to the distributor or dealer at the time of delivery of such vehicle or equipment by such manufacturer or distributor the certification that each such vehicle or item of motor vehicle equipment conforms to all applicable Federal motor vehicle safety standards. In the case of an item of motor vehicle equipment such certification may be in the form of a label or tag on such item or on the outside of a container in which such item is delivered. In the case of a motor vehicle such certification shall be in the form of a label or tag permanently affixed to such motor vehicle. Pub. L. 89-563, Title I, § 114, Sept. 9, 1966, 80 Stat. 726.

Section 115

§ 1404. National Traffic Safety Bureau; Traffic Safety Director; appointment

The Secretary shall carry out the provisions of this chapter through a National Traffic Safety Bureau (hereinafter referred to as the "Bureau"), which he shall establish in the Department of Commerce. The Bureau shall be headed by a Traffic Safety Director who shall be appointed by the President, by and with the advice and consent of the Senate. The Director shall be a citizen of the United States, and shall be appointed with due regard for his fitness to discharge efficiently the powers and the duties delegated to him pursuant to this chapter. The Director shall perform such duties as are delegated to him by the Secre-

tary. Pub.L. 89-563, Title I, § 115, Sept. 9, 1966, 80 Stat. 727, amended Pub.L. 89-670, § 8(i), Oct. 15, 1966, 80 Stat. 943; Pub.L. 90-83, § 10(b), Sept. 11, 1967, 81 Stat. 223.

Section 116

§ 1405. Effect upon antitrust laws

Nothing contained herein shall be deemed to exempt from the antitrust laws of the United States any conduct that would otherwise be unlawful under such laws, or to prohibit under the antitrust laws of the United States any conduct that would be lawful under such laws. Pub.L. 89-563, Title I, § 116, Sept. 9, 1966, 80 Stat. 727.

Section 118

§ 1406. Use of testing and research facilities of public agencies

The Secretary, in exercising the authority under this subchapter, shall utilize the services, research and testing facilities of public agencies to the maximum extent practicable in order to avoid duplication. Pub.L. 89-563, Title I, § 118, Sept. 9, 1966, 80 Stat. 728.

Section 119

§ 1407. Rules and regulations

The Secretary is authorized to issue, amend, and revoke such rules and regulations as he deems necessary to carry out this subchapter. Pub.L. 89-563, Title I, § 119, Sept. 9, 1966.

Section 120

§ 1408. Annual report to Congress; contents; recommendations

(a) The Secretary shall prepare and submit to the President for transmittal to the Congress on March 1 of each year a comprehensive report on the administration of this chapter for the preceding calendar year. Such report shall include but not be restricted to (1) a thorough statistical compilation of the accidents and injuries occurring in such year; (2) a list of Federal motor vehicle safety standards prescribed or in effect in such year; (3) the degree of observance of applicable Federal motor vehicle standards; (4) a summary of all current research grants and contracts together with a description of the problems to be considered

by such grants and contracts; (5) an analysis and evaluation, including relevant policy recommendations, of research activities completed and technological progress achieved during such year; and (6) the extent to which technical information was disseminated to the scientific community and consumer-oriented information was made available to the motoring public.

(b) The report required by subsection (a) of this section shall contain such recommendations for additional legislation as the Secretary deems necessary to promote cooperation among the several States in the improvement of traffic safety and to strengthen the national traffic safety program. Pub. L. 89-563, Title I, § 120, Sept. 9, 1966, 80 Stat. 728.

Section 121

§ 1409. Authorization of appropriations

(a) There is authorized to be appropriated for the purpose of carrying out the provisions of this subchapter, other than those related to tire safety, not to exceed $11,000,000 for fiscal year 1967, $17,000,000 for fiscal year 1968, and $23,000,000 for the fiscal year 1969.

(b) There is authorized to be appropriated for the purpose of carrying out the provisions of this subchapter related to tire safety and subchapter II of this chapter not to exceed $2,900,000 for fiscal year 1967, and $1,450,000 per fiscal year for the fiscal years 1968 and 1969. Pub.L. 89-563, Title I, § 121, Sept. 9, 1966, 80 Stat. 728.

II Section 3(f) of the Department of Transportation Act, P.L. 89-670 (80 Stat. 931), 49 U.S.C. § 1652 (f)(1):

(f) (1) The Secretary shall carry out the provisions of the National Traffic and Motor Vehicle Safety Act of 1966 through a National Traffic Safety Bureau (hereafter referred to in this paragraph as "Bureau"), which he shall establish in the Department of Transportation. The Bureau shall be headed by a Director who shall be appointed by the President, by and with the advice and consent of the Senate. All other provisions of the National Traffic and Motor Vehicle Safety Act of 1966 shall apply.

III The relevant provision of the Administrative Procedure Act (P.L. 89-554, 80 Stat. 392, 5 U.S.C. § 551 *et seq.*). (References in margin refer to sections of Administrative Procedure Act; text is taken from 5 U.S.C. § 551 *et seq.*)

Section 2

§551 Definitions

For the purpose of this subchapter

* * *

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

* * *

Section 4

§ 553 Rule making

(a) this section applies, according to the provisions thereof, except to the extent that there is involved –

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include –

(1) a statement of the time, place, and nature of public rule-making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply –

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except –

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 383.

Section 5

§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved –

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of –

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for –

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not –

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply –

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

Section 7

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence —

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may —

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 386.

Section 8

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses –

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions –

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of –

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

Section 10

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that –

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter –

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to revision by another agency, but does not include –

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b) (2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meaning given them by section 551 of this title.

Section 10 (a)

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392.

Section 10 (b)

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.

Section 10 (c)

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.

Section 10 (d)

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

Section 10 (e)

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be —

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

IV. Rule Making Procedures: Motor Vehicle Safety Standards, 23 C.F.R., Part 216 (Rev. Jan. 1, 1968)

Subpart A—General

Sec.

Subpart B—Procedures for Adoption of Rules Under Sections 103 and 119 of the Act

AUTHORITY: The provisions of this Part 216 issued under secs. 103 and 119, 80 Stat. 728; U.S.C. 1407; Delegation of Authority, Oct. 14, 1967, 32 F.R. 14277.

SOURCE: The provisions of this Part 216 appear at 32 F.R. 15818, Nov. 17, 1967, unless otherwise noted.

SUBPART A—GENERAL

§ 216.1 Applicability.

The part prescribes rule-making procedures that apply to the issue, amendment, and revocation of rules under sections 103 and 119 of the National Traffic and Motor Vehicle Safety Act of 1966.

§ 216.3 Definitions.

"Act" means the National Traffic and Motor Vehicle Safety Act of 1966, P.L. 89-563, 15 U.S.C. 1391, et seq.

"Administrator" means the Administrator of the Federal Highway Administration or a person to whom he has delegated final authority in the matter concerned.

"Rule" includes any order, regulation, or Federal motor vehicle safety standard issued under the Act.

§ 216.5 Regulatory docket.

(a) Information and data deemed relevant by the Administrator of the Federal Highway Administration relating to rule-making actions, including notices of proposed rule making; comments received in response to notices; denials of petitions for rule making and reconsideration; records of additional rule-making proceedings under § 216.25; and final rules are maintained in the Central File Room—Room 401, Federal Highway Administration, Donohoe Building, Sixth and D Streets, S. W., Washington, D. C. 20591.

(b) Any person may examine any docketed material at the Central File Room at any time during regular business hours after the docket is established, except material ordered withheld from the public under sections 112 and 113 of the Act (15 U.S.C. 1401, 1402) and section 552(b) of Title 5 of the United States Code, and may obtain a copy of it upon payment of a fee.

§ 216.7 Records.

Records of the Federal Highway Administration relating to rule-making proceedings are available for inspection as provided in section 552 (b) of Title 5 of the United States Code and Part 7 of the Regulations of the Secretary of Transportation (49 CFR Part 7; 32 F.R. 9284, et seq.).

SUBPART B–PROCEDURES FOR ADOPTION OF RULES UNDER SECTIONS 103 AND 119 OF THE ACT

§ 216.11 General.

Unless the Administrator, for good cause, finds that notice is impracticable, unnecessary, or contrary to the public interest, and incorporates that finding and a brief statement of the reasons for it in the rule, a notice of proposed rule making is issued and interested persons are invited to participate in the rule-making proceedings involving rules under sections 103 and 119 of the Act.

§ 216.13 Initiation of rule-making.

The Administrator initiates rule-making on his own motion. However, in so doing, he may, in his discretion, consider the recommendations of other agencies of the United States or of other interested persons.

§ 216.15. Contents of notices of proposed rule-making.

(a) Each notice of proposed rule-making is published in the FEDERAL REGISTER, unless all persons subject to it are named and are personally served with a copy of it.

(b) Each notice, whether published in the FEDERAL REGISTER or personally served, includes –

(1) A statement of the time, place, and nature of the proposed rule-making proceeding;

(2) A reference to the authority under which it is issued;

(3) A description of the subjects and issues involved or the substances and terms of the proposed rule;

(4) A statement of the time within which written comments must be submitted; and

(5) A statement of how and to what extent interested persons may participate in the proceeding.

§ 216.17 Participation by interested persons.

(a) Any interested person may participate in rule-making proceeding by submitting comments in writing containing information, views or arguments.

(b) In his discretion, the Administrator may invite any interested person to participate in the rule-making procedures described in § 216.25.

§ 216.19 Petitions for extension of time to comment.

A petition for extension of the time to submit comments must be received in duplicate not later than three (3) days before expiration of the time stated in the notice. The filing of the petition does not automatically extend the time for petitioner's comments. Such a petition is granted only if the petitioner shows good cause for the extension, and if the extension is consistent with the public interest. If an extension is granted, it is granted to all persons, and it is published in the FEDERAL REGISTER.

§ 216.21 Contents of written comments.

All written comments must be in English and submitted in twenty (20) legible copies, unless fewer copies are specified in the notice. Any interested person must submit as part of his written comments all the material that he considered relevant to any statement of fact made by him. Incorporation of material by reference is to be avoided. However, if such incorporation is necessary, the incorporated material shall be identified with respect to document and page.

§ 216.23 Consideration of comments received.

All timely comments are considered before final action is taken on a rule-making proposal. Late filed comments may be considered as far as practicable.

§ 216.25 Additional rule-making proceedings.

The Administrator may initiate any further rule-making proceedings that he finds necessary or desirable. For example, interested persons may be invited to make oral arguments, to participate in conferences between the Administrator or his representative and interested persons at which minutes of the conference are kept, to appear at informal hearings presided over by officials designated by the Administrator at which a transcript or minutes are kept, or participate in any other proceedings to assure informed administrative action and to protect the public interest.

§ 216.27 Hearings.

(a) Sections 556 and 557 of Title 5, United States Code, do not apply to hearings held under this part. Unless otherwise specified, hearings held under this part are informal, nonadversary, fact finding proceedings, at which there are no formal pleadings or adverse parties. Any rule issued in a case in which an informal hearing is held is not necessarily based exclusively on the record of the hearing.

(b) The Administrator designates a representative to conduct any hearing held under this part. The Chief Counsel of the Federal Highway Administration designates a member of his staff to serve as legal officer at the hearing.

§ 216.29 Adoption of final rules.

Final rules are prepared by representative of the office concerned and the Office of the Chief Counsel. The rule is then submitted to the Administrator for his consideration. If the Administrator adopts the rule, it is published in the FEDERAL REGISTER, unless all persons subject to it are named and are personally served with a copy of it.

§ 216.31 Petitions for rule-making.

(a) Any interested person may petition the Administrator to establish, amend, or repeal a rule.

(b) Each petition filed under this section must –

(1) Be submitted in duplicate to the Docket Clerk, Central File Room–Room 401, Federal Highway Administration, Donohoe Building, Sixth and D streets, S.W., Washington, D.C. 20591;

(2) Set forth the text or substance of the rule or amendment proposed, or specify the rule that the petitioner seeks to have repealed, as the case may be;

(3) Explain the interest of the petitioner in the action requested;

(4) Contain any information and arguments available to the petitioner to support the action sought.

§ 216.33 Processing of petition.

(a) General. Each petition received under § 216.31 is referred to the Director of the Bureau. Unless the Administrator otherwise specifies, no public hearing, argument, or other proceeding is held directly on a petition before its disposition un under this section.

(b) Grants. If the Administrator determines that the petition contains adequate justification, he initiates rule-making action under this Subpart B.

(c) Denials. If the Administrato determines that the petition does not justify rule-making, he denies the petition.

(d) Notification. Whenever the Administrator determines that a petition should be granted or denied, the Office of the Chief Counsel prepares a notice of that grant or denial for issuance to the petitioner, and the Administrator issues it to the petitioner.

§ 216.35 Petitions for reconsideration.

(a) Any interested person may petition the Administrator for reconsideration of any rule issued under this part. The petition must be submitted in twenty (20) legible copies to the Docket Clerk, Central File Room—Room 401, Federal Highway Administration, Donohoe Building, Sixth and D Streets, S.W., Washington, D.C. 20591, and received not later than thirty (30) days after publication of the rule in the FEDERAL REGISTER. Petitions filed after that time will be considered as petitions filed under § 216.31. The petition must contain a brief statement of the complaint and an explanation as to why compliance with the rule is not practicable, is unreasonable, or is not in the public interest.

(b) If the petitioner requests the consideration of additional facts, he must state the reason they were not presented to the Administrator within the prescribed time.

(c) The Administrator does not consider repetitious petitions.

(d) Unless the Administrator otherwise provides, the filing of a petition under this section does not stay the effectiveness of the rule.

§ 216.37 Proceedings on petitions for reconsideration.

The Administrator may grant or deny, in whole or in part, any petition for reconsideration without further proceedings. In the event he determines to reconsider any rule, he may issue a final decision on reconsideration without further proceedings, or he may provide such opportunity to submit comment or information and data as he deems appropriate. Whenever the Administrator determines that a petition should be granted or denied, he prepares a notice of the grant or denial of a petition for reconsideration, for issuance to the petitioner, and issues it to the petitioner. The Administrator may consolidate petitions relating to the same rule.

V. Order Establishing Motor Vehicle Safety Standard No. 202; Head Restraints on Passenger Cars, (33 Fed. Reg. 2945).

A proposal to amend § 255.21 of Part 255, Federal Motor Vehicle Safety Standards, by adding a new standard, Head Restraints–Passenger Cars; was published in the FEDERAL REGISTER on December 28, 1967 (32 F.R. 20865).

Interested persons have been afforded an opportunity to participate in the making of the amendment.

Several comments requested that the use of a 50th percentile adult male manikin be permitted in demonstrating compliance with the Standrad. The Administration feels that a 50th percentile manikin is not representative of a large enough percentage of the public, but recognizes that certain modifications to a 50th percentile manikin may result in a suitable test device. Therefore, the Standard has been modified to permit use of an approved equivalent test device.

A comment from an equipment manufacturer and an equipment manufacturers' association asserted that the Standard should not require that motor vehicle manufacturers provide head restraints at the time of vehicle manufacture, but that each customer should be free to equip his vehicle with head restraints of his own choice, maintaining that the installation of head restraints is a relatively simple matter and that there appears to be virtually no technological advantage in requiring factory installation. The Administration has determined that safety dictates that head restraints be provided on all passenger cars manufactured on or after January 1, 1969, and that a head restraint standard that merely specified performance requirements for head restraint equipment would not insure that all passenger cars would be so equipped, and would not, therefore, meet the need for safety. Furthermore, the Administration has determined that the performance of a head restraint is dependent upon the strength of the structure of the seat to which it is attached, as well as the compatibility of the head restraint with its anchorage to the seat structure.

Some of the comments expressed concern that the proposed Standard would exclude the use of head restraints that are integral with the seat back. The Administration did not intend to imply that "add-on" head restraint devices are the only available means of providing appropriate levels of protection. Such protection may be achieved by the use of a restraint system that is integral with the seat back.

Some comments noted that when testing head restraints that are adjustable to a height of more than 27.5 inches above the seating reference point, the load would not be applied to the appropriate portion of the head restraint. To provide the necessary flexibility, the Standard has been modified to specify that the point of load application and the point of width measurement be determined relative to the top of the head restraint rather than the seating reference point.

Some comments stated that the 8g performance requirement would be incomplete without the inclusion of a time duration requirement. The Administration has concluded that a minimum time duration of 80 milliseconds is appropriate and the Standard has been so modified.

Some comments requested that the location of the head restraint relative to the torso line be measured without a load being applied to the head restraint. The Administration feels that this measurement would be unrealistic and, therefore, the Standard requires that the measurement be taken during the application of the 132-pound initial load.

Many comments requested a more precise description of the method to be used in locating the test device's reference line and torso reference line. Therefore, the Standard has been modified to provide the necessary clarification.

Some comments claimed that lead time would be a problem; however, the Administration believes that the need to protect the public from neck injury outweighs the possible lead time problems.

Some comments claimed requested clarification of the term "approved representation of a human articulated neck structure." "Approved" is defined in § 255.3(b) as "approved by

the Secretary." The Secretary would approve the neck structure of a test device if it could be demonstrated by technical test data that the articulation of the neck structure represented that of a human neck. Approval could only be given to a structure sufficiently described in performance parameters to ensure reliable and reproducible test data.

In consideration of the foregoing, §255.21 of Part 255, Federal Motor Vehicle Safety Standards, is amended by adding Standard No. 202 as set forth below, effective January 1, 1969.

(Secs. 103 and 119 of the National Traffic and Motor Vehicle Safety Act of 1966; 15 U.S.C. 1392, 1407; and the delegation of authority of Mar. 31, 1967, 32 F.R. 5606; as amended Apr. 6, 1967, 32 F.R. 6495; July 27, 1967, 32 F.R. 11276; Oct. 11, 1967, 32 F.R. 14277; Nov. 8, 1967, 32 F.R. 15710, and Feb. 8, 1968)

Issued in Washington, D. C., on February 12, 1968.

LOWELL K. BRIDWELL,
Federal Highway Administrator.

MOTOR VEHICLE SAFETY STANDARD NO. 202

HEAD RESTRAINTS – PASSENGER CARS

S1. *Purpose and scope.* This standard specifies requirements for head restraints to reduce the frequency and severity of neck injury in rear-end and other collisions.

S2. *Application.* This standard applies to passenger cars.

S3. *Definitions.* "Head restraint" means a device that limits rearward angular displacement of the occupant's head relative to his torso line.

S4. *Requirements.* A head restraint that conforms to either (a) or (b) shall be provided at each outboard front designated seating position –

(a) It shall, when tested in accordance with S5.1, during a forward acceleration of at least 8g on the seat supporting structure, limit rearward angular displacement of the head reference line to 45° from the torso reference line; or

(b) It shall, when adjusted to its fully extended design position, conform to each of the following –

(1) When measured parallel to torso line, the top of the head restraint shall not be less than 27.5 inches above the seating reference point:

(2) When measured 2.5 inches below the top of the head restraint, the lateral width of the head restraint shall be not less than –

(i) 10 inches for use with bench-type seats; and

(ii) 6.75 inches for use with individual type seats;

(3) When tested in accordance with S5.2, the rearmost portion of the head form shall not be displaced to more than 4 inches perpendicularly rearward of the displaced extended torso reference line during the application of the load specified in S5.2(c); and

(4) When tested in accordance with S5.2, the head restraint shall withstand an increasing load until one of the following occurs –

(i) Failure of the seat or seat back; or

(ii) Application of a load of 22 pounds.

S5. Demonstration procedures.

S5.1 Compliance with S4.(a) shall be demonstrated in accordance with the following with the head restraint in its fully extended design position;

(a) On the exterior of the torso of a test device having the weight and seated height of a 95th percentile adult male with an approved representation of a human, articulated neck structure, or an approved equivalent test device, establish a reference line that, in profile view, coincides with the torso line of the test device.

(b) Place the head of the test device specified in (a) so that its center of gravity coincides, in profile view, with the extended torso reference line of the test device

and establish a reference line on the exterior of the head that, in profile view, coincides with the extended torso reference line.

(c) At each designated seating position having a head restraint, place the test device, snugly restrained by a Type 1 seat belt, in the manufacturer's recommended design seated position.

(d) During a forward acceleration of at least 8g for at least 80 milliseconds on the structure supporting the seat, measure the maximum rearward angular displacement between the extended torso reference line and the head reference line.

S5.2 Compliance with S4.(b) shall be demonstrated in accordance with the following with the head restraint in its fully extended design position:

(a) Locate the extended torso reference line at the manufacturer's recommended design seated position.

(b) Establish a line from the seating reference point to a point on the basic seat back structure 22 inches above the seating reference point (measured along the line) or at the top of the basic seat back structure, whichever is lower.

(c) Using a 6.5-inch diameter head form, apply, perpendicular to the torso line, a rearward initial load of 132 pounds 2.5 inches below the top of the head restraint.

(d) Locate the displaced extended torso reference line by rotating the extended torso reference line through an angle equal to the rearward angular displacement (due to the application of the load specified in (c)) of the line established in accordance with (b).

(e) Gradually increase this initial load to 200 pounds or until the seat or seat back fails, whichever occurs first.

Effective date: January 1, 1969.

[F.R. Doc. 68-1909; Filed, Feb. 13, 1968; 8:55 a.m.]

VI. Order Amending Motor Vehicle Safety Standard No. 202 – Head Restraints – Passenger Cars (33 Federal Register 5793).

Motor Vehicle Safety Standard No. 202, issued February 12, 1968, and published in the FEDERAL REGISTER February 14, 1968 (33 F.R. 2945), specifies requirements for head restraints to reduce the frequency and severity of neck injury in rear-end and other collisions to occupants of passenger cars manufactured after January 1, 1969.

Pursuant to 23 CFR 216.35 (32 F.R. 15818), interested persons could petition the Federal Highway Administrator for reconsideration on or before March 15, 1968.

Several petitioners questioned the 80 millisecond duration requirement of the 8g dynamic test on the grounds that it imposes a more severe load on the seat back than is required in Motor Vehicle Safety Standard No. 207, Anchorage of Seats–Passenger CArs. The Administrator has determined that the demonstration procedure should be revised to incorporate a half-sine wave acceleration pulse shape with an amplitude of 8g and a base (duration) of 80 milliseconds. This revised loading is closer to actual crash conditions, and is more consistent with existing seat strength requirements. The demonstration procedure has been revised to include the half-sine wave pulse shape.

Several petitioners questioned the method for establishing the displaced torso line for the static test on the grounds that it did not take into account the compression of the seat back cushion by the torso under load. The Administrator has determined that the Standard should be revised to take into account seat back cushion compression in establishing the displaced torso line, and the demonstration procedure has been revised accordingly.

One petitioner questioned the procedure outlined for establishing the dummy reference line for the dynamic test. The procedure made use of the torso line of the 95th percentile dummy or test device and there is no commonly accepted definition of this torso line. The Administrator has revised the procedure for establishing dummy torso reference lines to make use of the SAE two-dimensional

manikin, with its torso line established in accordance with SAE Aerospace–Automotive Drawing Standards.

One petitioner questioned the requirement that a spherical head form be used to apply the static load because tests have shown that this head form tends to slip under the foundation structure of the head restraint, thus showing an unrealistic loss of load. The Administrator has revised the demonstration procedure to include a cylindrical head form as an alternative.

One petitioner requested that the static load requirement of 200 pounds for head restraints adjusted to a height of 27.5 inches be changed to an equivalent moment about the seating reference point. This would permit the manufacturer who has a head restraint which adjusts higher than 27.5 inches to subject his head restraint to less than a 200 pound static load. This petition is denied. The Administrator has determined that the 200 pound static load should remain in the Standard to ensure that all head restraints sustain this load to meet the needs of safety.

Since this amendment provides clarification, relieves a restriction, and imposes no additional burden, notice and public procedure are unnecessary.

In consideration of the foregoing, § 255.21 of Part 255, Federal Motor Vehicle Safety Standard No. 202, which becomes effective January 1, 1969, is amended by revising sections 5.1 and 5.2 (relating to the demonstration procedures) to read as set forth below.

(Secs. 103, 119, National Traffic and Motor Safety Act of 1966 (15 U.S.C. 1392, 1407); delegation of authority of March 31, 1967 (32 F.R. 5606), as amended April 11, 1968 (33 F.R. 5803))

Issued in Washington, D.C., on April 11, 1968.

LOWELL K. BRIDWELL,
Federal Highway Administrator.

S5. Demonstration procedures.

S5.1 Compliance with S4.(a) shall be demonstrated in accordance with the following with the head restraint in its fully extended design position:

(a) On the exterior profile of the head and torso of a dummy having the weight and seated height of a 95th percentile adult male with an approved representation of a human, articulated neck structure, or an approved equivalent test device, establish reference lines by the following method:

(1) Position the dummy's back on a horizontal flat surface with the lumbar joints in a straight line.

(2) Rotate the head of the dummy rearward until the back of the head contacts the same flat horizontal surface in (1).

(3) Position the SAE J–826 two-dimensional manikin's back against the flat surface in (1), alongside the dummy with the h-point of the manikin aligned with the h-point of the dummy.

(4) Establish the torso line of the manikin as defined in SAE Aerospace-Automotive Drawing Standards, sec. 2.3.6, P.E1.01, September 1963.

(5) Establish the dummy torso reference line by superimposing the torso line of the manikin on the torso of the dummy.

(6) Establish the head reference line by extending the dummy torso reference line onto the head.

(b) At each designated seating position having a head restraint, place the dummy, snugly restrained by a Type 1 seat belt, in the manufacturer's recommended design seated position.

(c) During a forward acceleration applied to the structure supporting the seat as described below, measure the maximum rearward angular displacement between the dummy torso reference line and the head reference line. When graphically depicted, the magnitude of the acceleration curve shall not be less than that of a half sine wave having the amplitude of 8g and a duration of 80 milliseconds and not more than 20 percent above the half-sine wave. The half-sine wave is identified by the following formula in which "t" is time.

$$\text{Acceleration (g)} = \frac{((\ t)}{(0.08)}$$

S5.2 Compliance with S4.(b) shall be demonstrated in accordance with the following with the head restraint in its fully extended design position:

(a) Place a test device, having the back plan dimensions and torso line (centerline of the head room probe in full back position), of the three dimensional SAE J826 manikin, at the manufacturer's recommended design seated position.

(b) Establish the displaced torso reference line by applying a rearward moment of 3,300 in. lb about the seating reference point to the seat back through the test device back pan located in (a).

(c) After removing the back pan, using a 6.5 inch diameter spherical head form or a cylindrical head form having a 6.5 inch diameter in plan view and a 6-inch height in profile view, apply, perpendicular to the displaced torso reference line, a rearward initial load 2.5 inches below the top of the head restraint that will produce a 3,300 in. lb. moment about the seating reference point.

(d) Gradually increase this initial load to 200 pounds or until the seat or seat back fails, whichever occurs first.

[F.R. Doc. 68-4490; Filed, Apr. 15, 1968; 8:48 a.m.]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,820

AUTOMOTIVE PARTS & ACCESSORIES ASSOCIATION, INC.,

Petitioner

and

AUTOMOTIVE SERVICE INDUSTRY ASSOCIATION,

Intervenor

v.

ALAN S. BOYD, Secretary of the Department
of Transportation, et al.,

Respondents.

No. 22,015

[illegible]

Petitioner

v.

ALAN S. BOYD, Secretary of the Department
of Transportation, et al.,

Respondents.

ON PETITIONS FOR REVIEW OF SAFETY STANDARD
NO. 202 OF THE DEPARTMENT OF TRANSPORTATION

BRIEF FOR THE RESPONDENTS

EDWIN L. WEISL, JR.,
Assistant Attorney General,

MORTON HOLLANDER,
NORMAN KNOPF,
Attorneys,
Department of Justice,
Washington, D.C. 20530

INDEX

CITATIONS

Cases:

ISSUES PRESENTED

In the opinion of the respondent officials of the Department of Transportation, the issues presented for review are:

1. Whether Motor Vehicle Safety Standard No. 202, entitled "Head Restraints -- Passenger Cars", was properly issued in accordance with the informal rule making procedures prescribed by the Administrative Procedure Act.

2. Whether Motor Vehicle Safety Standard No. 202, requiring head restraints on all passenger cars manufactured for sale after 1968 so as to reduce the occurrence of neck injuries sustained by passengers in automobile collisions, constitutes a reasonable exercise of the power conferred upon the Secretary of Transportation by the National Traffic and Motor Vehicle Safety Act of 1966.

NOTE: The pending petitions for review have not been before this Court previously.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,820

AUTOMOTIVE PARTS & ACCESSORIES ASSOCIATION, INC.,

Petitioner

and

AUTOMOTIVE SERVICE INDUSTRY ASSOCIATION,

Intervenor

v.

ALAN S. BOYD, Secretary of the Department of Transportation, et al.,

Respondents.

No. 22,015

STERLING PRODUCTS CO., INC.,

Petitioner

v.

ALAN S. BOYD, Secretary of the Department of Transportation, et al.,

Respondents

ON PETITIONS FOR REVIEW OF SAFETY STANDARD NO. 202 OF THE DEPARTMENT OF TRANSPORTATION

BRIEF FOR THE RESPONDENTS

COUNTERSTATEMENT OF THE CASE

Pursuant to the authority vested in them by the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. 1381, et seq. (Supp. II, 1965-66), respondent officials of the

Department of Transportation, on February 12, 1968, issued Motor Vehicle Safety Standard No. 202 (33 Fed. Reg. 2945, Feb. 14, 1968; R. 1046). This safety standard, entitled "Head Restraints -- Passenger Cars," requires that all passenger cars manufactured on or after January 1, 1969, be equipped with front seat head restraints. Petitioners, a manufacturer of automobile accessories and two trade associations representing persons dealing in automobile accessories, concerned that Safety Standard No. 202 would work to the competitive and economic disadvantage of petitioners and those they represent, administratively sought to prevent the standard from being issued in its present form, and once issued, administratively sought to have it changed. Unsuccessful in these attempts, petitioners now seek review of Safety Standard No. 202 directly in this Court, pursuant to 15 U.S.C. 1394 (Supp. II, 1965-66).[1/] They ask that this Court declare the head restraint safety standard invalid.

1/ The petition for review of Automobile Parts and Accessories, Inc. was filed in this Court on April 10, 1968 (C.A.D.C. No. 21,820) and by order of the Court dated May 21, 1968, Automotive Industry Association was permitted to intervene in that action. The petition of Sterling Products Co., Inc., (C.A.D.C. No. 22,015) was originally filed with the Court of Appeals for the Eighth Circuit but was transferred to this Circuit pursuant to 28 U.S.C. 2112. By order of this Court of July 11, 1968, the two petitions for review were consolidated.

With the exception of one other case, Boating Industry Ass'n. v. Boyd, (C.A. 7, No. 16,808), not yet scheduled for oral argument, the litigation here represents the only case to date in which a petition to review a safety standard issued under the National Traffic and Motor Vehicle Safety Act of 1966 has been prosecuted.

In demonstrating the validity of Motor Vehicle Safety Standard No. 202, it is of course necessary to take into account not only the substantive provisions of the standard but also the statutory provisions pursuant to which the standard was issued, and the procedures followed in issuing the standard. Accordingly, we set forth below an explanation of the applicable provisions of the National Traffic and Motor Vehicle Safety Act of 1966, and an outline of the procedures followed in issuing the standard, in addition to an explanation of the substantive provisions of Safety Standard No. 202.

1. The National Traffic and Motor Vehicle Safety Act of 1966.

The National Traffic and Motor Vehicle Safety Act of 1966 (Safety Act), 80 Stat. 718 et seq., 15 U.S.C. 1381 et seq. (Supp. II, 1965-66)[2/] was enacted by Congress "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. 1381. To that end, Congress conferred upon the Secretary of Transportation [3/] the power to establish Federal Motor

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2/ The relevant provisions of the Safety Act are set forth in an appendix to petitioners' brief, pp. A2-A22.

3/ The Safety Act as originally enacted conferred authority for issuing safety standards upon the Secretary of the Department of Commerce. However, by subsequent legislation and administrative action, discussed at pp.42-45 infra, the powers given to the Secretary of Commerce were transferred to the Secretary of the subsequently created Department of Transportation.

Vehicle Safety Standards. 15 U.S.C. 1392(a). The Safety Act defines a Motor Vehicle Safety Standard as "a minimum standard for motor vehicle performance, or motor vehicle equipment performance . . .." 15 U.S.C. 1391(2). The only mandatory criteria set forth in the Safety Act governing the substance of the standards issued by the Secretary is that such standards "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms." 15 U.S.C. 1392(a).

Reflecting Congressional concern with speedy promulgation of safety measures, the Safety Act, enacted in September, 1966, also requires that the Secretary issue, at the least, a set of initial Motor Vehicle Safety Standards, based upon existing safety standards, on or before January 31, 1967, and a set of additional and revised standards by January 31, 1968. 15 U.S.C. 1392(h).

In issuing any safety standard, the Secretary must take into consideration certain factors expressly prescribed by the Safety Act. Thus, the Secretary shall consider whether any proposed standard is "reasonable, practicable and appropriate for the particular type of motor vehicle or item of motor vehicle equipment" and whether such standards "will contribute to carrying out the purposes" of the Safety Act. 15 U.S.C. 1392(f)(3) and (4). In addition, in issuing a standard, the Secretary is to consult with the National Motor Vehicle Advisory Council, and as he deems appropriate, the Vehicle Equipment Safety Commission, and other public agencies. 15 U.S.C. 1392(f)(2),

1393(b). Furthermore, in prescribing a safety standard, the Secretary is to consider available relevant motor vehicle safety data, including results of research, testing and evaluation activities conducted by the Secretary pursuant to provisions of the Safety Act which permit him to conduct such activities in order to fulfill the purpose of the legislation. 15 U.S.C. 1392(f)(1), 1395.

Finally, in issuing safety standards, the Secretary must comply with the applicable provisions of the Administrative Procedure Act, 5 U.S.C. 551 et seq. (Supp. II, 1965-66), for the Safety Act provides that "the Administrative Procedure Act shall apply to all orders establishing, amending, or revoking a Federal motor vehicle safety standard . . ." 15 U.S.C. 1392(b).

Any person "adversely affected" by the issuance of a safety standard may petition directly to the United States Court of Appeals for the circuit in which he resides for review of the administrative action. 15 U.S.C. 1394(a). The Court of Appeals is to review the administrative action "in accordance with section 1009 of Title 5 [§ 10 of the Administrative Procedure Act, 5 U.S.C. 706 (Supp. II, 1965-66)] and to grant appropriate relief as provided in such section." 15 U.S.C. 1394(a)(3).

Once a safety standard becomes effective, the manufacture or sale of any motor vehicle or motor vehicle equipment not complying with the safety standard is prohibited.

(a) No person shall --

(1) manufacture for sale, sell, offer for sale, or introduce or deliver for introduction in interstate

> commerce, or import into the United States, any motor vehicle or item or motor vehicle equipment manufactured on or after the date any applicable Federal motor vehicle safety standard takes effect under this subchapter unless it is in conformity with such standard . . .. [15 U.S.C. 1397(a)(1)].

To facilitate the administration of the Safety Act and to assure compliance with the standards, the Act further provides that "every manufacturer or distributor of a motor vehicle or motor vehicle equipment shall furnish to the distributor or dealer at the time of delivery of such vehicle or equipment . . . the certification that each vehicle or item of motor vehicle equipment conforms to all applicable Federal motor vehicle safety standards." 15 U.S.C. 1403.

Any person violating a provision of a Motor Vehicle Safety Standard is subject to a civil penalty of not more than $1,000 for each violation and subject to an injunction, issued by a district court, restraining violations of the Act. 15 U.S.C. 1398, 1399.

2. Procedures Followed In the Issuance of Safety Standard No. 202.

In issuing Safety Standard No. 202, requiring front seat head restraints on all passenger cars manufactured on or after January 1, 1969, the Secretary followed the procedures for informal rule making prescribed by the Administrative Procedure Act. 5 U.S.C. 551 et seq (Supp. II, 1965-66).[4/]

4/ The applicable provisions of this Act are set forth in an appendix to petitioners' brief, pp. A23-A33.

On November 30, 1966, the Secretary issued a notice of proposed rule making. This notice was duly published in the Federal Register and announced, among other things, that the Secretary was considering the promulgation of 23 initial Federal Motor Vehicle Safety Standards, including a head restraint standard, to be established under the applicable provisions of the National Traffic and Motor Vehicle Safety Act of 1966. (31 Fed. Reg. 15212-13, 15218-219, Dec. 3, 1966; R. 1016-17, 1022-23). Each of the proposed standards, including Safety Standard No. 202, was set forth in the notice (31 Fed. Reg. 15218-19; R. 1022-23). Interested persons were invited to participate in the making of the standards by submitting written comments upon the proposed standards to the Secretary by January 3, 1967.

After considering all of the comments submitted, on January 31, 1967, the date required by the Safety Act for the issuance of Initial Safety Standards, 15 U.S.C. 1392(h), the Secretary issued as Initial Safety Standards 20 of the 23 standards originally proposed in the November 30, 1966 notice of proposed rule making (32 Fed. Reg. 2408-10, Feb. 3, 1967; R. 1027-29). Safety Standard No. 202 was not one of the 20 Initial Safety Standards so promulgated. The Secretary did not promulgate a head restraint standard as he concluded it would be helpful to have additional information before issuing such a standard (32 Fed. Reg. 2417, Feb. 3, 1967; R. 1036). Therefore, also on January 31, 1967, the Secretary issued an advance notice of proposed rule making (32 Fed. Reg. 2417-18, Feb. 3, 1967; R. 1036-37). This notice again announced the intention of the

Department of Transportation to issue a head restraint standard that will reduce the likelihood of neck injuries and requested interested persons to submit written comments, especially comments relating to the possibility of a standard which incorporates head restraint requirements within a single unified system of occupant seating and restraint arrangements. All comments were to be submitted by May 1967.

On November 14, 1967, a meeting was held between officials of the National Highway Safety Bureau of the Department of Transportation and numerous automobile manufacturers, automobile equipment manufacturers, and other interested parties. The sole matter discussed at the meeting was a head restraint safety standard. (See transcript of meeting, R. 752-869.)

On December 22, 1967, a notice of proposed rule making was issued (32 Fed. Reg. 20865, Dec. 28, 1967; R. 1042). This notice set forth the provisions of proposed Safety Standard No. 202 dealing with head restraints. The notice stated that the proposed standard was formulated after consultation with the National Motor Vehicle Safety Advisory Council, consideration of all comments submitted pursuant to previous rule making notices, and consideration of comments made at the November 14, 1967 meeting with Department officials. The notice further stated that interested parties could submit, by January 26, 1968, comments upon Safety Standard No. 202 as proposed in the notice.

On February 12, 1968, Safety Standard No. 202 was promulgated effective January 1, 1969 (33 Fed. Reg. 2945-6, Feb. 14,

1968; R. 1046-47). Some provisions of the standard promulgated on this date were slightly different than the provisions of the safety standard as proposed in the previously published December 22, 1967 notice of proposed rule making. These modifications were based upon the comments received by the Secretary in response to the notice of proposed rule making (33 Fed. Reg. 2945; R. 1046). Suggestions submitted by equipment manufacturers' in response to the December 22nd notice of proposed rule making, for major changes in the proposed safety standard, were rejected by the Secretary with an explanation of some of the reasons for the rejection set forth in the February 12, 1968 announcement promulgating the safety standard (33 Fed. Reg. 2945; R. 1046).

Finally, after the February 12th promulgation of the standard, Petitions for Reconsideration of Safety Standard No. 202 were filed with the Department by various parties, including the petitioners in the case at bar (R. 932-38). Some of the suggestions submitted in the Petitions for Reconsideration by persons other than petitioner here were adopted, resulting in minor changes being made in the provisions of the standard (33 Fed. Reg. 5793-94, April 16, 1968; R. 1048-49). However, the Petitions for Reconsideration submitted by petitioners here were denied for the reasons set forth in a three page letter to petitioners dated May 20, 1968 (R. 1225-27).

3. Safety Standard No. 202.

Under the above-described rule making procedures, the Department of Transportation received numerous and extensive

comments regarding a head restraint safety standard from such diverse sources as automobile and automobile accessory manufacturers, universities, medical associations, state agencies, and the Department's own professional staff (R., e.g., 668-71, 627-28, 498, 427-31, 473, 725, 742-43). These comments demonstrated that neck injuries to automobile passengers due to rear-end collisions occur with great frequency and that head restraints reduce considerably the likelihood of such injuries (R., e.g., 427, 498-615, 733-34, 738-41). None of the persons submitting comments seriously contested the fact that head restraints can reduce the possibility of neck injuries. For example, in numerous statements to the Department, petitioner Sterling conceded the beneficial safety effects of head restraints.[5/]

Moreover, considerable data indicated that the general public was not fully aware of the necessity of head restraints for safety (R., e.g., 862-63, 865). Thus, although head restraints had been offered by car manufacturers as optional equipment in past years, relatively few new car purchasers ordered this equipment (R., e.g., 373).

5/ E.g., "I welcome the imposition of governmental standards for head restraints to protect the safety of the auto driver and passengers." (Letter of the President of petitioner Sterling of 5/5/67, commenting on Safety Standard No. 202; R. 460)

"It has been well established that head restraints will minimize and, in many cases, prevent whiplash injury to drivers and front seat occupants . . ." (Letter of the President of petitioner Sterling of 2/24/68, commenting upon Safety Standard No. 202; R. 627.)

Information submitted to the Department of Transportation also demonstrated that for the maximum safety effect, the construction of a front seat head restraint had to be coordinated with the construction of the front seat so as to assure that the seat back will collapse in a collision before the head restraint collapses. (See, e.g., University of California, Institute of Transportation and Traffic Engineering, Backrest and Head Restraint Design for Rear-End Collision Protection (1968), (R. 609). Otherwise, the collapse of the head restraint before the seat back could result in harm to passengers by the passenger striking the rough edges of a broken head restraint[6/] (R., e.g., 227, 609).

Finally, additional data submitted to the Department indicated that automobile manufacturers needed at least until 1969 before they could change the production facilities so as to install head restraints in each car they manufacture (R., e.g., 668-71).

In accord with this information received through the rule making process, Motor Vehicle Safety Standard No. 202 recites as its purpose to specify the requirements for head restraints "to reduce the frequency and severity of neck injury in rear-end and other collisions." (33 Fed. Reg. 2946; R. 1047). To accomplish that purpose, the standard requires that all passenger cars manufactured on or after January 1, 1969, contain front seat

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6/ Of course, if the head restraint fails before the seat back fails during a collision, this would be detrimental to safety as the passenger would be deprived of the benefits of a head restraint at this crucial time.

head restraints and that such restraints meet the standard's specifications. The standard lists, in terms of performance requirements, the specifications that must be met. Any head restraint, whether manufactured by the automobile producer himself or by an independent automobile accessory manufacturer such as petitioner Sterling, may be installed in a car manufactured for sale as long as it meets the standard's specifications. In determining whether a head restraint meets the specifications, the head restraint is to be tested in conjunction with the supporting seat structure. One test advanced by the standard is that the seat or seat back fail under increasing pressure before the head restraint fails.

Petitioners, believing the requirement of Safety Standard No. 202, that all passenger cars manufactured for sale contain head restraints, would result in each manufacturer installing his own make of head restraint to the economic and competitive disadvantage of petitioners or those petitioners represent, petitioned the Secretary of Transportation, by formal Petitions for Reconsideration, to change the standard so that "the requirement of factory installation be deleted" (R. 932). The proposal for deletion of factory installation had been advanced previously before the Secretary and rejected, (R., e.g., 1046), and was again rejected by the Secretary in denying the Petitions for Reconsideration (R. 1225-1227).

Under the scheme urged by petitioners, in lieu of a mandatory requirement that all passenger cars manufactured for sale

be equipped with head restraints meeting the performance specifications set forth in Safety Standard No. 202, a safety standard would be issued that merely sets forth performance specifications that must be met by any head restraint offered for sale on the market (R. 933, 937). Petitioners envisioned that under this scheme, they, or the parties they represent, could manufacture and supply approved head restraints to any car owner who happens to decide he would like to have them installed. In this way, petitioners argued, the "economic hardship" placed upon persons who manufacture, sell and install head restraints would be avoided and competition fostered (R. 934). In the decision of the Department of Transportation denying the Petitions for Reconsideration of petitioners, this proposal was expressly rejected.

The Secretary found that head restraints were a "paramount safety benefit" to car passengers. Therefore, it was essential that all cars have such devices (R. 1226). The Secretary also noted that the safety benefits of head restraints were conceded by the petitioners (R. 1225). The Secretary reasoned that a standard which merely specified the requirements a head restraint must meet, but left the decision whether to install such a device to the option of the car owner, would not result in every car being equipped with head restraints (R. 1226-27). Accordingly, he concluded, such a standard would not meet the needs of safety (R. 1227).

In reaching this decision, the Secretary also considered the possible detrimental effect upon competition in general,

and petitioners' "competitive position" in particular, of a standard requiring cars, as they are manufactured, to be equipped with head restraints (R. 1225-26).7/ Weighing these considerations against the safety considerations, the Secretary concluded that the demands of safety, in this instance, outweighed the other considerations (R. 1226). Giving greatest weight to the safety factors was deemed by the Secretary to be in accord with the "purpose and policy of the National Traffic and Highway Safety Act of 1966" (R. 1226).

The Secretary also viewed the Petitions for Reconsideration as suggesting some sort of standard be promulgated which would result in each purchaser of an automobile being required to equip his car with head restraints that met the specifications set by the Secretary (R. 1226). Under such a plan, rather than the relatively few automobile manufacturers being primarily responsible for the installation of an approved head restraint at place of manufacture, the primary responsibility would be placed upon each of the millions of car purchasers. Car owners, presumably after buying their car from dealers, would be required in the

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7/ As noted above, p.12 supra, Safety Standard No. 202 permits a car manufacturer the choice of installing his own brand of approved head restraint or one manufactured by an independent producer and sold to the automobile manufacturer.

words of petitioners "to select for installation the particular head restraint which best suits their needs from among competing brands certified to be in compliance with the Standard" (R. 934). Thus, petitioners argue, the requirements of safety would be met as each car would be required to have head restraints approved by the Secretary but by delaying the installation of such restraints, petitioners and those they represent would be in a better position to supply the head restraints.

The Secretary rejected this proposal on the ground that the Safety Act did not confer upon him the authority to adopt such a proposal (R. 1226). The Secretary reasoned, in effect, that the provisions of the Safety Act place the basic responsibility for the construction and equipping of safe cars upon the car manufacturers rather than the car purchasers. Therefore, the Secretary lacked the authority to compel each car purchaser to install head restraints while permitting automobile manufacturers to manufacture cars for sale devoid of this essential safety device which has been made required equipment for all new cars.

Moreover, the Secretary ruled that even if he had the authority under the Safety Act to permit the manufacture of vehicles without the safety device and to require the purchaser to have it installed, he would not adopt such a plan. The Secretary found "the performance of a head restraint system is dependent upon the interrelation between the head restraint, the structure of the seat and the seat anchorage" (R. 1227). Therefore, since an approved head restraint had to be tested in conjunction with

the seat structure, and the seat structure was installed in the car by the manufacturer, the Secretary deemed it preferable to have a standard which in effect would result in one person, the manufacturer of a car, being responsible for the installation of the head restraints and its related components and for the testing of the performance of the head restraint system as a single unit in conjunction with those components (R. 1226, 1046). Accordingly, the Secretary denied petitioners' Petitions for Reconsideration (R. 1225-27).

INTRODUCTION AND SUMMARY

Petitioners seek judicial review of Federal Motor Vehicle Safety Standard No. 202 issued by the Department of Transportation under the National Traffic and Motor Vehicle Safety Act of 1966 (15 U.S.C. 1381 et seq., Supp. II, 1965-66). That Act authorizes the review of a safety standard by this Court "in accordance with section 1009 of Title 5 [Section 10 of the Administrative Procedure Act, 5 U.S.C. 702-06]". Section 10 of the Administrative Procedure Act, in effect, provides that a court shall sustain administrative action unless that action violated procedures required by law or was otherwise arbitrary or capricious.

Safety Standard No. 202 was issued pursuant to the informal rule making procedure set forth in the applicable provisions of the Administrative Procedure Act. All of the procedural requirements specified in that act for informal rule making were

properly adhered to by the Secretary in issuing the challenged standard. Consequently, the issuance of Safety Standard No. 202 is free from procedural error.

Similarly, the substantive provisions of the standard are valid. The Safety Act vests broad power and discretion in the Secretary of the Department of Transportation to issue Motor Vehicle Safety Standards after considering various factors. After weighing those factors, the Secretary has determined, by issuing Safety Standard No. 202, that front seat head restraints are essential for safety and that providing the riding public with best possible safety protection requires installation of approved head restraints on all passenger cars manufactured for sale on or after January 1, 1969. This standard is consistent with the provisions of the Safety Act and constitutes a reasonable exercise of the authority conferred upon the Secretary under that Act. Accordingly, the validity of the standard should be sustained. It is not for this Court to substitute its judgment for that of the Secretary, the official charged by the Safety Act with the responsibility for the Act's administration.

ARGUMENT

I

SAFETY STANDARD NO. 202 WAS PROPERLY ISSUED IN ACCORDANCE WITH THE INFORMAL RULE MAKING PROCEDURES PRESCRIBED BY THE ADMINISTRATIVE PROCEDURE ACT.

The Administrative Procedure Act, 5 U.S.C. 551 et seq. (Supp. II, 1965-66) prescribes two procedures that may be followed

by an agency in making an administrative determination, adjudication and informal rule making. 5 U.S.C. § 553, 554; see American Airlines Inc. v. Civil Aeronautics Board, 123 App. D.C. 310, 315, 359 F. 2d 624, 629 (1966)(en banc), certiorari denied, 385 U.S. 843.[8/] Safety Standard No. 202 was properly issued on the basis of an informal rule making process which adhered to all the applicable procedural requirements set forth in the Administrative Procedure Act.

A. Informal Rule Making Was a Proper Procedure For the Issuance of Safety Standard No. 202

The plain language of the Safety Act, the nature of the task involved, the legislative history of the Safety Act, and court decisions, all demonstrate that it was proper for Safety Standard No. 202 to be issued through an informal rule making process.

1. The Safety Act provides that "the Administrative Procedure Act shall apply to all orders establishing, amending, or revoking a Federal motor vehicle safety standard . . .." 15 U.S.C.

8/ The act also prescribes formal rule making which requires administrative action to be based upon a record after an opportunity for a hearing. However, formal rule making procedures are essentially the same as those for adjudication and are considered the same for purposes of this brief. 5 U.S.C. § 553(c). American Airlines Inc. v. Civil Aeronautics Board, supra, 123 App. D.C. at p. 312, 359 F. 2d at p. 626.

1392(a). This statement is not modified in any way so as to make inapplicable the informal rule making provisions of the A.P.A. Thus, by its plain terms, the Safety Act permits the Secretary, in issuing safety standards, to utilize the informal rule making procedures of the A.P.A.

Other express provisions of the Safety Act also demonstrate that the informal rule making process was to be followed. Before issuing a safety standard, the Act provides for the Secretary to consult with the National Motor Vehicle Safety Advisory Council as well as with various state, interstate and legislative committees. 15 U.S.C. 1392(f), 1393(b). Informal consultation with advisory committees and the like is peculiarly a characteristic of the rule making process rather than the more formal adjudicatory process. See 1 Davis, Administrative Law, §6.03 (1958). Furthermore, provisions of the Safety Act specify that the Secretary is to conduct extensive experimentation and research to obtain relevant data to be used in formulating safety standards. 15 U.S.C. 1392(f)(1), 1395. This necessarily implies the Secretary is to be free to confer with experts and technicians employed by him to perform such experimentation and research. If the Secretary were limited to adjudicatory procedures in issuing safety standards, he would not be able to so consult with his staff. See American Airlines Inc. v. Civil Aeronautics Board, supra, 123 App. D.C. at p. 317, 359 F. 2d at p. 631.

2. The nature of the task involved is one that is proper for informal rule making. The Safety Act, through the mechanism

of safety standards, requires the Secretary to perform essentially a legislative function, to issue rules of law of general applicability governing future conduct. These rules are based upon broad policy considerations rather than review of a particular individual's past conduct. Such a task traditionally is considered to be one of rule making. See The Attorney General's Manual on the Administrative Procedure Act, p. 14 (1947); American Airlines, Inc. v. Civil Aeronautics Board, supra, 123 App. D.C. at pp. 315-316, 359 F. 2d at pp. 629-30.

Accordingly, it is of no surprise that Safety Standard No. 202 squarely fits the definition of "rule" as used in the Administrative Procedure Act. That Act defines "rule" as:

> The whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . of an agency . . ." [5 U.S.C. 551(4)].

The fact that Safety Standard No. 202 fits the definition of a rule also demonstrates the propriety of issuing Safety Standard No. 202 by rule making. See Air Line Pilots Ass'n. v. Civil Aeronautics Board, 215 F. 2d 122, 124 (C.A. 2, 1954); American Airlines Inc. v. Civil Aeronautics Board, supra, 123 App. D.C. at p. 316, 359 F. 2d at p. 630.

Another consideration pointing to the propriety of having safety standards issued by rule making is that safety standards are to be issued as speedily as possible. Under the Safety Act, Congress mandated that initial safety standards be issued in less than five months from the passage of the Act and additional

safety standards within the following year. 15 U.S.C. 1392(h). Thus, rule making, traditionally faster than the process of adjudication, is indicated. See 1 Davis, supra, pp. 379-383.

Finally, it should be noted that other agencies assigned a similar task by Congress, i.e., the promulgation of safety rules, issue such rules by the informal rule making process rather than the adjudicatory process. E.g., Federal Aviation Agency, 49 U.S.C. 1421(a), 1423, 1424, 14 C.F.R. §§33, 37, 71; Coast Guard, 46 U.S.C. 39, 46 C.F.R. §32.

3. The legislative history of the Safety Act, like the plain language of the Act and the nature of the task involved, demonstrates that safety standards properly may be issued by informal rule making.

Different versions of the Safety Act were enacted by each house of Congress before the passage of the Act in its final form. The Senate bill expressly provided that the Secretary could issue safety standards by informal rule making under the Administrative Procedure Act. Not only did the bill permit the Secretary to issue standards by informal rule making, but the Secretary was specifically forbidden to utilize the adjudicatory procedures of the A.P.A.

> Sec. 103(a). Subject to the provisions of this section, on or before January 31, 1968, the Secretary shall prescribe, by order, in accordance with sections 3, 4, and 6 of the Administrative Procedure Act (5 U.S.C. 1002, 1003, 1005) [rule making] new and revised motor vehicle safety standards . . . .
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> (f) Nothing in this title or in the Administrative Procedure Act shall be construed to make sections 7 and 8

> [adjudication] of such Act applicable to proceedings under this title.

S. Rep. 1301, 89th Cong., 2nd Sess., pp. 25-26 (1966).

The House bill did not preclude the use of adjudicatory procedures. The House bill merely stated that "the Administrative Procedure Act shall apply to all orders establishing, amending or revoking, a Federal motor vehicle safety standard . . .." H. Rep. 1776, 89th Cong., 2nd Sess., p. 2 (1966). In explaining this provision, the House Report stated that "the Secretary may utilize either the informal rulemaking procedures of section 4 of the APA or the more formal and extensive procedures of that act, ..." H. Rep., supra, at p. 16.

The Conference Committee adopted the House version of the bill regarding A.P.A. procedures. The adoption of the House version by the conferees was explained to the Senate by Senator Magnuson, a sponsor of the Safety Act and a conferee, shortly before the Senate adopted the legislation in final form. Senator Magnuson stated:

> With respect to sections 7 and 8 of the Administrative Procedure Act, which apply to formal hearings, the Senate bill had expressly provided that these sections would not apply to standard-setting procedures under the act. It was the clear understanding of the conferees, however, that under the language of the House bill, the Secretary will utilize the informal rulemaking procedures of section 4 of the Administrative Procedure Act: and that he need hold a formal hearing under sections 7 and 8 only if he determines that such hearing is desirable. [Emphasis added]. [112 Cong. Rec. 20600, Aug. 31, 1966, daily ed.].

Thus, Congressional comments directed to the question of procedures to be employed in the issuing of safety standards expressly

demonstrate the intention of Congress to permit standards to be issued by informal rule making.9/

4. Finally, judicial decisions make clear that rule making was a proper procedure for the issuance of Safety Standard No. 202. In order to require administrative action to be based upon adjudicatory procedures, rather than informal rule making, the statute under which the administrative action is taken, by its express terms, must so restrict the agency for the courts will not imply such a restriction. See Pacific Coast European Conference v. United States, 350 F. 2d 197 (C.A. 9, 1965), certiorari denied, 382 U.S. 958; compare Wirtz v. Baldor Elec. Co., 119 App. D.C. 122, 337 F. 2d 518 (1964). Thus, this Court stated, in American Airlines Inc. v. Civil Aeronautics Board, supra, which raised the issue of whether certain administrative action should have been made on the basis of an adjudicatory proceeding rather than by informal rule making, that in the absence of "clear and specific" Congressional requirements to the contrary, an agency should be permitted to act by rule making and that rule making should not be limited or "shackled" by the imposition of adjudicatory formalities. American Airlines, Inc. v. Civil Aeronautics Board, supra, 123 App. D.C. at p. 315, 359 F. 2d at p. 629. See also Attorney General's Manual on the Administrative Procedure

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9/ Petitioners, in arguing safety standards must be issued by following the formal adjudicatory process, are silent with regard to this legislative history as they find it "superfluous" and "uncertain" (Pet. br. p. 13).

Act, supra, at pp. 34-35. The Safety Act plainly contains no such "clear and specific" requirements limiting rule making. To the contrary, as demonstrated above, it was the express intention of Congress to permit rule making.

In sum, the Safety Act permits the Secretary to issue safety standards by informal rule making. Although the Act might also permit the Secretary to proceed by the more formal adjudicatory process, he has not chosen such a process to issue Safety Standard No. 202. The choice of which of the two permitted procedures should be followed is a matter, of course, solely within the discretion of the Secretary which was reasonably exercised here. See Securities and Exchange Comm. v. Chenery Corp., 332 U.S. 194, 203 (1947); Logansport Broadcasting Corp. v. United States, 93 App. D.C. 342, 345, 210 F. 2d 24, 27 (1954).

Even if some valid reason could be advanced (and we perceive none) that would make it arguable as to whether or not the Safety Act required adjudicatory procedures for the issuance of a safety standard, this would not be legally sufficient to have this Court impose such a procedure. The Secretary of the Department of Transportation, to whom the administration of the Act has been entrusted, has construed its provisions as permitting informal rule making procedures. That construction is a reasonable one and accordingly entitled to great weight. This Court should not disturb that interpretation unless clearly erroneous. See e.g., Udall v. Tallman, 380 U.S. 1, 16 (1965); Philadelphia Television Broadcasting Co. v. F.C.C., 123 App. D.C. 298, 359 F. 2d 282 (1966);

Hammond v. Hull, 76 App. D.C. 301, 303, 131 F. 2d 23, 25 (1942), certiorari denied, 318 U.S. 777. The Secretary's interpretation is plainly not clearly erroneous.

Petitioners, nevertheless, contend that Safety Standard No. 202 can only be issued pursuant to the formal adjudicatory procedures set forth in sections 7 and 8 of the A.P.A. 5 U.S.C. 556, 557. In support of this position, they rely primarily upon the fact that the Safety Act requires the Secretary to issue Safety Standards by "order." (Pet. br. p. 11). Since the word "order" is used in the A.P.A. to denote administrative decrees arising out of the adjudicatory process, they conclude that in this indirect way, Congress meant to limit the Secretary to the adjudicatory process. The fallacy of petitioners' argument, in short, is that there is no indication in the language of the Safety Act, or the legislative history, that Congress intended to use the term "order" in the narrow and special way attributed to it by petitioners. In fact, the legislative history clearly reveals a contrary intent. See discussion pp. 21-23 supra. For example, as noted above pp. 21-22 supra, the Senate version of the Safety Act expressly prohibited the application of sections 7 and 8 of the A.P.A., the adjudicatory sections, to the issuance of standards. Yet the Senate version of the Safety Act also was phrased in terms of the issuance of safety standards by "order." See §103(a) and (f) of the Senate bill, reprinted pp. 21-22 supra.

Petitioners also note that a provision of the Safety Act dealing with judicial review, 15 U.S.C. 1394, contains language

which is normally associated with the adjudicatory process, and infer that Congress, in this subtle way, intended to make mandatory the use of the adjudicatory process in the issuance of every safety standard (Pet. br. pp. 16-17). This language, however, cannot reasonably be construed to annul the express provision of the Safety Act contained in the section of the Act dealing with the procedures for issuing standards. That provision, as noted above pp. 18-19, supra, states that the whole Administrative Procedure Act shall apply and not just the adjudicatory sections. 15 U.S.C. 1392(b). Nor can the language in the judicial review provision referred to by petitioners be reasonably construed to negate the clear legislative history of the Act expressly demonstrating Congressional intent to permit the Secretary to issue standards by informal rule making. See discussion pp.21-23, supra.

The legislative history of the judicial review provision shows that the language of that provision was not intended to preclude the Secretary from issuing safety standards by informal rule making. The judicial review provision of the Safety Act was based upon the judicial review provision of the Food and Drug Act, 21 U.S.C. 371(f). H. Rep. 1776, supra, at p. 20; 112 Cong. Rec. 18,778 (Aug. 17, 1966 daily ed.)(remarks by Committee Chairman Staggers). One of the major reasons the Food and Drug Act's review provision was used was that it permitted judicial review for any "adversely affected" party. Id. Another provision of the Food and Drug Act, 21 U.S.C. 371(e), the provision immediately preceding the judicial review provision of the Food

and Drug Act incorporated into the Safety Act, provides for the issuance of rules solely by an adjudicatory process.[10/] Congress was careful, however, not to incorporate this provision into the Safety Act. S. Rep. 1301 supra at pp. 25-26; H. Rep. 1776, supra at p. 16; 112 Cong. Rec., supra, at p. 20600. See discussion pp. 21-23 supra. Thus, although the language used in the judicial review provision of the Safety Act contains some terms normally associated with an adjudicatory process because Congress adopted the judicial review provision from another act, it was not the intention of Congress to preclude administrative action by rule making.[11/]

10/ 21 U.S.C. 371(e) sets forth in detail the procedures by which the Secretary of Health, Education and Welfare is to issue regulations under the Food and Drug Act. If an adversely affected person files an objection to a regulation, the Secretary must hold a hearing.

> (3) As soon as practicable . . . the Secretary . . . shall hold such a public hearing for the purpose of receiving evidence relevant and material to the issues raised by such objections. At the hearing, any interested person may be heard in person . . .. As soon as practicable after completion of the hearing, the Secretary shall by order act upon such objections and make such order public. Such order shall be based only on substantial evidence of record at such hearing and shall set forth, as part of the order, detailed findings of fact on which the order is based . . ..

11/ 15 U.S.C. 1394(a)(2), giving the reviewing court power to remand to the Secretary for the taking of additional evidence at a hearing and modification of findings, is of course applicable where the Secretary utilizes adjudicatory procedures. Where the Secretary utilizes rule making procedures, as he is authorized to do under 15 U.S.C. 1392(b) of the Safety Act, there are two ways to construe Section 1394(a)(2). It may be read as wholly inapplicable (in which case the reviewing court would nevertheless still have power to remand under Section 10 of the Administrative Procedure Act, made applicable by 15 U.S.C. 1394(a)(3) of the Safety Act). Or the terms "evidence", "hearing" and "findings" as used in Section 1394 may be read in a non-technical sense as referring to the informal procedures followed in rule making proceedings.

B. Safety Standard No. 202 Was Issued in Conformity With the Procedural Requirements For Informal Rule Making.

We have shown in Part A that Safety Standard No. 202 was properly issued by the process of informal rule making. We now show that all the procedural requirements for such rule making were satisfied by the Secretary in the issuance of the standard.

The procedural requirements governing rule making are "limited." American Airlines Inc. v. Civil Aeronautics Board, supra, 123 App. D.C. at p. 315, 359 F. 2d at p. 629. In general, rule making procedures require only that interested parties be given an opportunity to participate in the rule making process by the submission of written material to the issuing authority. See, e.g., American Airlines, Inc. v. Civil Aeronautics Board, supra; California Citizens Band Assn. v. United States, 375 F. 2d 43, 53-54 (C.A. 9, 1967), certiorari denied, 389 U.S. 844; Attorney General's Manual on the Administrative Procedure Act, supra, at p. 26. See also Jones v. District of Columbia, 116 App. D.C. 301, 303-04, 323 F. 2d 306, 308-09 (1963); The Flying Tiger Line, Inc. v. Boyd, 244 F. Supp. 889 (D.D.C. 1965). Thus the rule making procedures set forth in section 4 of the Administrative Procedure Act require merely publication of a notice of the substance of the proposed rule or the subject or issues involved,[12/] an opportunity

12/ The publication by an agency of various rule making proposals for comment by interested parties does not, of course, preclude the agency, before adopting the proposals, from altering the proposals on the basis of the comments received. See California Citizens Band Assn. v. United States, supra, 375 F. 2d at p. 48-49; Logansport Broadcasting Co. v. United States, 93 App. D.C. 342, 346; 210 F. 2d 24, 28 (1954).

for interested parties to participate through submission of written data, and the right of petition for reconsideration of rules once promulgated. 5 U.S.C. 553; see American Airlines Inc. v. Civil Aeronautics Board, supra, 123 App. D.C. at 315, 359 F. 2d at 629.[13/]

As discussed above pp.6-9, supra, these procedural requirements of rule making were fully satisfied in the issuance of Safety Standard No. 202: proper notice was given, an opportunity provided to submit written material, and an opportunity provided to petition for reconsideration.[14/]

The allegations of procedural errors contained in petitioners' brief, inter alia, are based upon petitioners' failure to discern the difference between the rule making process and the adjudicatory process. The rule making process requires only those procedures discussed above, all of which have been fully satisfied

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13/ Section 4 of the A.P.A. also requires that the rules issued pursuant to this procedure contain "a concise general statement of their basis and purpose." 5 U.S.C. 553(c). Safety Standard No. 202 plainly meets this requirement. See Attorney General's Manual on the Administrative Procedure Act, supra, at p. 32. Compare New York Freight Forwarders and Brokers Ass'n. v. Federal Maritime Comm., 337 F. 2d 289, 296 (C.A. 2, 1964), certiorari denied, 380 U.S. 910; Hoving Corp. v. F.T.C., 290 F. 2d 803 (C.A. 2, 1961). See also 2 Davis, Administrative Law, supra, §16.01.

14/ Petitioners were also given an opportunity, which they availed themselves of, to submit information orally at the November 14, 1967 conference with safety officials of the Department (R. 752-886).

Petitioners cite certain provisions of regulations of the Department governing the issuance of safety standards after a hearing presided over by a legal officer. They claim such regulations are unlawful. (Pet. br. p. 22). The validity of these provisions (which are clearly lawful) is irrelevant as they were not utilized in the issuance of Safety Standard No. 202 since no such hearing was held.

in the issuance of Safety Standard No. 202. Rule making under the A.P.A., as a legislative function, does not require that a rule be issued only after a hearing is held at which evidence is submitted, and on the basis of the record so compiled, findings of fact and conclusions of law are made by the hearing officer. See, e.g., American Trucking Assn. v. United States, 344 U.S. 298, 319-20 (1953); Logansport Broadcasting Co. v. United States, supra, 93 App. D.C. at p. 345, 210 F. 2d at pp. 27-28; California Citizens Band Assn. v. United States, supra, 375 F. 2d at pp. 50, 54; Attorney General's Manual on the Administrative Procedure Act, supra, at pp. 31-35; Davis, supra at p. 371. Cf. Pacific States Box & Basket Co. v. White, 296 U.S. 176 (1935); Jones v. District of Columbia, supra, 116 App. D.C. at pp. 303-04, 323 F. 2d at pp. 308-09; The Flying Tiger Line, Inc. v. Boyd, supra, 244 F. Supp. at p. 892.

II

SAFETY STANDARD NO. 202 CONSTITUTES A REASONABLE EXERCISE OF THE POWERS CONFERRED UPON THE SECRETARY OF TRANSPORTATION BY THE NATIONAL TRAFFIC AND MOTOR VEHICLE SAFETY ACT OF 1966.

In Part I we have shown that Safety Standard No. 202 was properly issued by an informal rule making process in which all of the procedural requirements for informal rule making were fully satisfied. We now show that the standard that emerged from these procedures is a valid one as its provisions constitute a reasonable exercise of the authority conferred upon the Secretary of Transportation by the Safety Act.

1. It is elementary that a reviewing court will set aside administrative action only if it is "arbitrary" or "capricious". 5 U.S.C. 706(2)(A); see, e.g., New York Foreign Freight Forwarders and Brokers Ass'n. v. Federal Maritime Comm., supra, 337 F. 2d at p. 295; Review Committee v. Willey, 275 F. 2d 264, 272 (C.A. 8, 1960), certiorari denied, 363 U.S. 827.[15/] A preliminary question therefore arises as to what constitutes arbitrary or capricious action as applied to the issuance of a rule when (as shown in Part I) there are no procedural irregularities.

15/ It is also elementary that the party challenging the validity of an administrative rule or regulation has the burden of proving its invalidity. E.g., New York Foreign Freight Forwarders and Brokers Ass'n. v. Federal Maritime Comm., supra, 337 F. 2d at 295; Review Committee v. Willey, supra, 275 F. 2d at p. 272.

legislation which empowers the Secretary of Transportation to establish Motor Vehicle Safety Standards which may be made mandatory for all motor vehicles manufactured for sale. 15 U.S.C. 1392(a), 1397, 1403.

In administering the Safety Act, the Secretary, through the rule making process, had information before him which showed that front seat head restraints were an essential safety device which greatly reduces the possibility of neck injuries and that car manufacturers and car owners were not voluntarily installing such devices in all passenger cars. (See discussion and citations, pp. 9-11 , supra.) Consequently, the Secretary issued Safety Standard No. 202, making front seat head restraints meeting prescribed specifications mandatory on all cars manufactured for sale.[16/]

The Secretary plainly had authority to issue Safety Standard No. 202 under the Safety Act and that standard is obviously consistent with the provisions of the Act and bears a "reasonable relation" to the purpose of the Safety Act. Therefore, this standard constitutes a reasonable exercise of the powers vested in the Secretary and is valid.

16/ As required by the Safety Act, Safety Standard No. 202 sets forth the performance criteria a head restraint must meet rather than listing an approved design for the head restraint. Thus, a head restraint of any design may be installed as long as its performance meets the minimum specifications of the standard. See parts "S 4 and S 5" of Safety Standard No. 202. R. 1047, 1049. See also R. 1046.

3. Petitioners nevertheless contend, in effect, that the action of the Secretary is arbitrary because the standard requires that all passenger cars, when they are manufactured for sale, be equipped with an approved head restraint. As explained above, however, the Secretary plainly has the authority under the Safety Act to require all passenger cars manufactured for sale to be equipped with such head restraints. Therefore, what petitioners are actually arguing is, not that the Secretary lacked authority to issue such a standard, but that under all the circumstances here, he should not have exercised that authority, and to do so was an abuse of discretion.

Petitioners contend the Secretary should have exercised his authority so as to issue an equipment standard rather than a mandatory motor vehicle standard. Pet. br. pp. 39 fn. 4, 41. The Safety Act, (as previously noted p. 4 , supra), in addition to conferring upon the Secretary the power to issue mandatory standards that every motor vehicle must meet, permits the Secretary to issue equipment standards. 15 U.S.C. 1391(2). Under such a standard, the Secretary could require all head restraints used in passenger cars to meet certain minimum specifications. However, this standard, as an equipment standard, would not make mandatory the installation of head restraints on all cars. Whether to install head restraints would remain optional with each consumer. If the consumer does decide to install a head restraint, it would have to be one that met the equipment standard.

The Secretary expressly rejected the proposal as not fully meeting the needs of safety (R. 1226-27, 1046). In the Secretary's judgment, safety required that every car be equipped with a head restraint and not just those cars whose owners, at their option, determined should have head restraints. Such a determination by the Secretary is plainly reasonable and in accord with the purpose of the Safety Act.

Petitioners further contend that the Secretary acted arbitrarily in not adopting a standard which would make the installation of head restraints mandatory but would require the purchaser of a car, apparently after he purchases the car, to select a head restraint and have it installed (Pet. br. p. 43). This proposal also was expressly rejected by the Secretary (R. 1226).

The Safety Act places the primary responsibility for safe motor vehicles upon automobile manufacturers. When the Secretary issues mandatory safety standards, it is the automobile manufacturer that is expressly forbidden by the Safety Act from producing a car for sale not in conformity with such a standard. 15 U.S.C. 1397(a)(1). Moreover, the manufacturer must certify that each vehicle he has made for sale fully complies with such standards. 15 U.S.C. 1403. Thus, motor vehicle safety under the Safety Act generally is to be achieved by the Secretary applying and enforcing safety requirements at the relatively few sources of production of cars rather than by applying and enforcing requirements against the millions of individual purchasers. Accordingly, the Secretary ruled that the Safety Act did not confer upon him the legal authority to issue a mandatory

safety standard which would compel each purchaser of a passenger car to select and install head restraints while permitting automobile manufacturers to produce cars for sale without this mandatory safety device (R. 1226). The Secretary's interpretation of the provisions of the safety act is a reasonable one, and therefor should not be disturbed by this Court. See, e.g., Udall v. Tallman, supra, 380 U.S. at p. 16; Philadelphia Television Broadcasting Co. v. F.C.C., supra; Hammond v. Hull, supra, 76 App. D.C. at p. 103, 131 F. 2d at p. 25. Since the Secretary lacked the power to adopt petitioners' proposal, its rejection obviously cannot be deemed an abuse of discretion.[17/]

Moreover, even if the Secretary had the authority under the Safety Act to adopt a standard that shifted the responsibility for installation of head restraints from the manufacturer to the consumer, the failure to adopt such a plan could not be considered arbitrary or an abuse of discretion. The Secretary did consider

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17/ Petitioners also advance the suggestion that the Secretary should have issued a standard which permits each car purchaser to select the style and brand of approved head restraint he desires and then the automobile manufacturer would install such a head restraint in the car before delivery. Petitioner draws an analogy between this process and the other options offered a consumer by automobile manufacturers, such as body color and style. Pet. br. p. 43 fn. 5.

Petitioners fail to realize that Safety Standard No. 202 does permit such a selection process. The standard does not preclude an automobile manufacturer from offering the consumer a choice of styles and brands of approved head restraints, including those produced by independent manufacturers such as petitioner Sterling. The standard simply does not compel the manufacturer to offer such a choice.

what standard he would adopt if he, in fact, had the statutory authority to implement petitioners' proposals. He weighed various factors in addition to safety, including the economic effect upon petitioners and competition in the field of automobile accessories, and concluded that it was still preferable to adopt a standard, which like other standards issued by him, kept the basic responsibility for installation of head restraints with the automobile manufacturer (R. 1226). The Secretary noted that Safety Standard No. 202 required head restraints to be constructed and tested in conjunction with the seat structure and seat anchorage. Therefore, it was desirable to adopt a standard that would result in the automobile manufacturer, who is responsible for the seat structure and seat anchorage, to be responsible for the installation of head restraints as well. R. 1226-27. See also R. 227, 609. Thus, even if the Secretary had authority to regulate car purchasers so as to require them to equip their cars with head restraints (which he does not), his decision to refrain from issuing such a standard is a reasonable one. That decision should not be disturbed by this Court in an attempt to substitute its judgment for that of the Secretary.[18/] See, e.g., American Trucking Assn.'s v. United States, supra, 344 U.S. at p. 314; Ayrshire Corp. v. United States, 335 U.S. 573, 593 (1949); Air Line Pilots Assn. v. Quesada, 182 F. Supp. 595, 599 (S.D.N.Y. 1960), aff'd., 276 F. 2d 892 (C.A. 2).

18/ Of course the fact that government regulation may cause severe economic hardship to a party does not make such regulation unreasonable. See, e.g., Lindsley v. Natural Carbine Gas Co., 220 U.S. 61 (1911); Walls v. Midland Carbon Co., 254 U.S. 300 (1920); Texas American Asphalt Corp. v. Walker, 177 F. Supp. 315, 327 (S.D. Tex., 1959).

III

PETITIONERS' OTHER CONTENTIONS ARE AISO WITHOUT MERIT.

Petitioners' brief raises numerous additional issues which it is claimed show the illegality of Safety Standard No. 202. These issues, like the issues of procedure and reasonableness discussed in Part I and Part II above, pp. 17-38, supra, are without merit. The invalidity of petitioners' additional contentions is demonstrated briefly below.

1. Petitioners correctly note (Pet. br. p. 26) that the Safety Act, 15 U.S.C. 1392(f)(2), provides that the Secretary, in issuing Motor Vehicle Safety Standards, is to consult with the Vehicle Equipment Safety Commission. Petitioners contend that the Secretary failed to consult with this Commission. This contention is erroneous. The record discloses that the Secretary invited the Vehicle Equipment Safety Commission to give its views upon the head restraint standard and that the Commission did in fact submit written comments to the Secretary regarding that standard. (R. 158, 725.)[19]

2. Similarly, petitioners contend (Pet. br. p. 26) that the Secretary failed to consult the National Motor Vehicle Safety Advisory Council as required by the Safety Act, 15 U.S.C.

19/ Senator Magnuson, in explaining the consultation provisions of the Act, made clear what was required of the Secretary. "In the administration of this provision it is expected that the Secretary will, to the extent consistent with the purposes of this Act, inform VESC [Vehicle Equipment Safety Commission] and other agencies of the proposed standards and amendments thereto and afford them a reasonable opportunity to study and comment therein." 112 Cong. Rec. 20600 (Aug. 31, 1966, daily ed). Plainly the Secretary has complied with this requirement.

1393(b), before issuing Safety Standard No. 202. Again, however, the record shows this contention to be without merit. In the December 28, 1967, notice published in the Federal Register, 32 Fed. Reg. 20865, listing the proposed head restraint standard, it is expressly stated that the standard was promulgated after consultation with the National Motor Vehicle Safety Advisory Council. (R. 1042.)

3. Petitioners appear to advance the argument, in the alternative, that even if the Advisory Council were consulted by the Secretary, that consultation was of no effect as the Advisory Council was not properly constituted (Pet. br. pp. 27-28). Petitioners claim that 15 U.S.C. 1393(a), creating the National Motor Vehicle Safety Advisory Council, requires the Secretary to place on the Advisory Council representatives of motor vehicle equipment manufacturers, and that the Secretary failed to place such representatives on the Advisory Council before the head restraint standard was issued. Even assuming, arguendo, there was no person to represent the views of equipment manufacturers on the Advisory Council, the Advisory Council was properly constituted as there is no requirement that the equipment manufacturers be represented on the Council. Section 1393(a) sets forth only one mandatory membership requirement -- that a majority of the Advisory Council be composed of representatives of the general public. Although the section further provides that the other members of the Advisory Council shall include representatives of various enumerated automotive interests, the section does not compel the Secretary to appoint representatives from every-

one of such interests. To the contrary, the legislative history of this section makes clear that the composition of the Advisory Council, with the sole exception that a majority of its members represent the public, lies in the sound discretion of the Secretary and that the enumeration of special interests in section 1393(a) constitutes merely a suggestion by Congress to the Secretary. Conf. Rep. 1919, 89th Cong., 2d Sess., p. 17 (1966) (the Secretary has "full discretion in determining the makeup of the Council"); see e.g. 112 Cong. Rec. 20597 (Aug. 31, 1966, daily ed., remarks of Senator Magnuson). Thus, in explaining to the House section 1393(a), as itemerged from the House-Senate Conference Committee, it was stated:

> We have suggested in the legislation the other areas from which the appointments will come . . . but left it to the discretion of the Secretary since it is an advisory committee . . . He may want a number of automobile men on it . . . and some truck equipment manufacturers. We do not know yet who will be helpful to him in this advisory capacity. This allows him flexibility of doing whatever is necessary and appropriate for an advisory committee. (Emphasis added.)

112 Cong. Rec. 20460-61 (Aug. 18, 1966, daily ed., remarks of Rep. Rogers).

4. Finally, petitioners attack the validity of Safety Standard No. 202 on the ground that the standard was issued by the wrong agency of the Department of Transportation (Pet. br. pp. 23-26). Safety Standard No. 202 was issued in the name of the Administrator of the Federal Highway Administration of the Department of Transportation. Petitioners, relying upon a provision of the Safety Act, 15 U.S.C. 1404, contend the Safety Standard should have been issued by the Director of National Traffic Safety Bureau. Petitioners have failed to note, however, that legislation, regulations, and an executive order issued subsequent to the passage of section 1404 have resulted in the abolition of the National Traffic Safety Bureau and the placing of authority for the issuance of Safety Standard No. 202 in the hands of the Administrator of the Federal Highway Administration. We outline below the administrative scheme demonstrating the propriety of the issuance of Safety Standard No. 202 by the Administrator of the Federal Highway Administration.

The National Traffic and Motor Vehicle Safety Act, as originally enacted by Congress in 1966, provided that "The Secretary [of the Department of Commerce] shall carry out the provisions of this Act through a National Traffic Safety Agency . . . headed by a Traffic Safety Administrator . . . . The Administrator shall perform such duties as are delegated to him by the Secretary." (Emphasis added.) (Pub. L. 89-563, § 115, 80 Stat. 727, Sept. 9, 1966). This provision was amended subsequently so as to substitute for "Agency" the word "Bureau,"

and for "Administrator" the word "Director". 15 U.S.C. 1404, P.L. 89-670, § 8 1, 80 Stat. 943 (Oct. 15, 1966).

By subsequent legislation creating the Department of Transportation, Congress conferred upon the Secretary of Transportation all the powers the Safety Act originally gave to the Secretary of Commerce. 49 U.S.C. 1655(a)(6)(A) (1965-66, Supp. II). The Secretary of Transportation was expressly authorized, in the exercise of his discretion, to delegate any of the powers conferred upon him to any subordinate officials. 49 U.S.C. 1657(e)(1) (1965-66, Supp. II). In addition, the legislation transferred the National Traffic Safety Bureau from the Department of Commerce to the Department of Transportation. 49 U.S.C. 1652(f)(1) (1965-66, Supp. II).

Pursuant to the authority vested in him to delegate his powers to subordinates as he deems appropriate, the Secretary of Transportation has delegated responsibility for exercising various powers conferred upon him by the Safety Act, including the authority to issue Safety Standard No. 202, to the Administrator of the Federal Highway Administration. 32 Fed. Reg. 5606 (April 5, 1967), 33 Fed. Reg. 2995 (February 15, 1968). And within the Federal Highway Administration, the Secretary placed the National Traffic Safety Bureau, headed by a Director, who reports directly to the Administrator of the Federal Highway Administration. 32 Fed. Reg. 5606 (April 5, 1967). However, by Executive Order 11357, 32 Fed. Reg. 8225 (June 8, 1967), the President, under the authority conferred upon him

by 49 U.S.C. 1652(f)(3) (1965-66, Supp. II), abolished the National Traffic Safety Bureau and assigned its duties to the National Highway Safety Bureau. The Highway Safety Bureau, as was the Traffic Safety Bureau, is a bureau within the Federal Highway Administration which bureau is headed by a Director, Dr. William Haddon, who reports directly to the Federal Highway Administrator. 32 Fed. Reg. 5606, § 1.3(d) (April 5, 1967). Thus, under the administrative scheme so established, the National Highway Safety Bureau was properly assigned the basic responsibility for formulating Safety Standard No. 202 by such means as gathering information, holding conferences with the automotive industry, conducting research, and writing reports, e.g., R. 742, 753-869, while the Administrator of the Federal Highway Administration was delegated the authority to issue, under his name, Safety Standard No. 202.

In sum, Federal Motor Vehicle Safety Standard No. 202, requiring front seat head restraints on passenger cars, constitutes a reasonable exercise of the powers conferred upon the Secretary of Transportation to accomplish the purpose of the National Traffic and Motor Vehicle Safety Act, "to reduce . . . deaths and injuries to persons resulting from traffic accidents." (15 U.S.C. 1381). In addition, Safety Standard No. 202 was properly issued in accordance with all procedures required by the Safety Act and the Administrative Procedure Act. Therefore,

the validity of Safety Standard No. 202 should be sustained.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for review be denied and that the validity of Federal Motor Vehicle Safety Standard No. 202 be sustained.

EDWIN L. WEISL, Jr.,
Assistant Attorney General,

MORTON HOLLANDER,
NORMAN KNOPF,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

AUGUST 1968

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In the

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,820

AUTOMOTIVE PARTS & ACCESSORIES ASSOCIATION, INC.,

Petitioner,

vs.

ALAN S. BOYD, et al.,

Respondents,

AUTOMOTIVE SERVICE INDUSTRY ASSOCIATION,

Intervenor.

No. 22,015

STERLING PRODUCTS CO., INC.,

Petitioner,

vs.

ALAN S. BOYD, et al.,

Respondents.

BRIEF ON BEHALF OF AUTOMOTIVE SERVICE INDUSTRIES ASSOCIATION, INTERVENOR

HAROLD T. HALFPENNY
HALFPENNY, HAHN & RYAN
111 West Washington Street
Chicago, Illinois 60602
Phone 782-1829

J. AUSTIN LATIMER
1725 K Street, N.W.
Washington, D.C. 20006
Phone 554-3940

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BRIEF OF INTERVENOR AUTOMOTIVE SERVICE INDUSTRIES ASSOCIATION

Our Petition to Intervene pointed out that Automotive Service Industry Association is a national trade associa-

tion with membership of over 500 independent manufacturers and rebuilders, 5000 wholesalers and warehouse distributors of automotive parts, equipment, and accessories, sold both as original equipment to vehicle manufacturers and as replacement parts for automobiles, trucks, and buses to supply and service over 250,000 garages and service stations. Manufacturers and distributors include those who produce or distribute head restraints for passenger cars, and so are parties directly interested in Standard 202.

This Intervenor approves and adopts the Briefs filed herein by Petitioners. While approving of everything that is said there, we emphasize the cases there cited referring to judicial review of the Department's ruling.

The importance of the statutory right to appeal cannot be overstated. We are all aware of the increasing areas in which substantial rights are entrusted to and determined by administrative agencies. The federal judiciary, in this case the Court of Appeals, has been given by Congress the right and the responsibility for making sure that these agencies do not abuse the power given to them.

The careful and full exercise of that power by the federal courts is the one factor which makes tolerable the enormous power of the administrative agencies. *N.L.R.B.* v. *Brown,* 380 U.S. 278, 291 (1965), cited on Page 1 of Petitioner's Reply Brief, pointed out that "Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions * * *". To this we would add, not only are they not obliged to stand aside, they cannot stand aside if they are to fulfill the duties which Congress has imposed upon them.

CONCLUSION

For all of the reasons given in Petitioner's Briefs, we submit that the order establishing Federal Motor Vehicle Safety Standard No. 202 be declared a nullity and be set aside.

Respectfully submitted,

HAROLD T. HALFPENNY
HALFPENNY, HAHN & RYAN
111 West Washington Street
Chicago, Illinois 60602
Phone 782-1829

J. AUSTIN LATIMER
1725 K Street, N.W.
Washington, D.C. 20006
Phone 554-3940

REPLY BRIEF FOR PETITIONERS

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Respondents.

MILTON EISENBERG
1700 K Street, N. W.
Washington, D. C.
Attorney for Petitioners

Of Counsel:
STRASSER, SPIEGELBERG, FRIED,
FRANK & KAMPELMAN
James B. Blinkoff

THE CASILLAS PRESS, INC. — 1717 K Street, N. W. — Washington, D. C. 20006

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REPLY BRIEF FOR PETITIONERS

I. RESPONDENTS FAILED TO CARRY OUT THE PROVISIONS OF THE NATIONAL TRAFFIC AND MOTOR VEHICLE SAFETY ACT THROUGH THE AGENCY DESIGNATED BY CONGRESS.

The Government's brief contends that the Secretary of Transportation's construction of the procedural requirements of the law is entitled to "great weight" and that this Court should not "disturb" the Secretary's interpretation of those procedural requirements unless "clearly erroneous." (Respondents' Brief p. 24)

However, as the Supreme Court recently observed in refusing to enforce an order of the National Labor Relations Board, an agency which has had over 20 years of administrative experience: "Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *N.L.R.B. v. Brown,* 380 U. S. 278, 291 (1965). Certainly the courts, and particularly this Court, are as competent as either the Secretary of Transportation or the Federal Highway Administrator to determine what procedures are required to be followed in the promulgation of safety standards under the National Traffic and Motor Vehicle Safety Act. We would include the Director of the National Highway Safety Bureau in this comparison, but it is apparent that this Respondent has had nothing to do with determining the agency's procedures. (Respondents' Brief pp. 42-44)

Petitioners pointed out in their brief that the omission of the Director of the National Highway Safety Bureau from the administrative procedures for issuing safety standards was one of several fatal defects in the agency's procedure. (Petitioners' Brief pp. 23-26)[1] The Government contends, however, that despite the express provisions of section 115 of the National Traffic and Motor Vehicle Safety Act (15 U.S.C. §1404), the Act need not be carried out through the National Highway Safety Bureau and acknowledges that under the "administrative scheme" developed by the Respondents, it is the Federal Highway Administrator and not the Director of the National Highway Safety Bureau to whom authority to carry out the Act has been delegated by the Secretary. (Respondents' Brief pp. 42-44)

The asserted justification for the agency's disregard of the statutory mandate as to how and by whom the National Traffic and Motor Vehicle Safety Act should be administered is that under subsequent legislation creating the Department of Transportation, the Secretary of Transportation was given "discretion"

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[1] The relationship between the National Traffic Safety Bureau and the National Highway Safety Bureau is discussed *infra.*

to delegate any of the powers conferred upon him to any subordinate officials. (Respondents' Brief p. 43) This assertion ignores the fact that section 3(f) of Public Law 89-670 (15 U.S.C. §1652(f)), the Department of Transportation Act, explicitly provides that the Secretary of Transportation "shall carry out the provisions of the National Traffic and Motor Vehicle Safety Act of 1966 through a National Traffic Safety Bureau" and further that "all other provisions of the National Traffic and Motor Vehicle Safety Act of 1966 shall apply." These provisions in the Department of Transportation Act, paralleling those in the National Traffic and Motor Vehicle Safety Act, belie the Government's assertion that this statute permitted "the placing of authority for the issuance of Safety Standard No. 202 in the hands of the Administrator of the Federal Highway Administration." (Respondents' Brief p. 42)

It should be noted that on the same day as Congress enacted the National Traffic and Motor Vehicle Safety Act of 1966, it also enacted the Highway Safety Act of 1966. Section 201 of the Highway Safety Act of 1966 (23 U.S.C. §401 note) provided that the Secretary shall carry out the provisions of that Act through a National Highway Safety Bureau headed by a Director appointed by the President by and with the advice and consent of the Senate. This same section also authorized the President to carry out the provisions of the National Traffic and Motor Vehicle Safety Act of 1966 through the Bureau and Director provided for in the Highway Safety Act, obviously to allow a single director and agency to administer both statutes. This same authority is also set forth in section 3(f) of the Department of Transportation Act (49 U.S.C. §1652(f)(3)), and was implemented by the President in Executive Order 11357, 32 Fed. Reg. 8225 (June 8, 1967), set out as a note under 15 U.S.C. §1392. But there is nothing in this Executive Order, or in the Department of Transportation Act, or in the National Traffic and Motor Vehicle Safety Act, or in the Highway Safety Act, which authorizes the Secretary to "carry out" the provisions of the National Traffic Safety Act through the Federal Highway Administrator rather than the National Traffic or Highway Safety Bureau, and the Government's statements to the contrary in its brief are in error.

Moreover, the Secretary of Transportation subsequent to the filing of Petitioners' Brief in this proceeding and prior to the filing of the Government's Brief, amended the procedural regulations of the Department of Transportation in a belated attempt to remedy the unlawful delegation of power previously made. On August 10, 1968, the Secretary of Transportation published in the Federal Register an amendment to the Regulations of the Office of the Secretary of Transportation which expressly provides that "the provisions of the National Traffic and Motor Vehicle Safety Act of 1966, as amended, (15 U.S.C. 1381 *et seq.*) shall be carried out by the National Highway Safety Bureau." (33 Fed. Reg. 11405, August 10, 1968) Prior to this amendment, the Regulations delegated solely to the Federal Highway Administrator the Secretary's functions, powers and duties under both the National Traffic and Motor Vehicle Safety Act and the Highway Safety Act. (49 C.F.R. §1.4(c)(3))

In a preamble to his amendment to the Department's Regulations, the Secretary of Transportation explains that it is being issued to "conform" the regulations to Executive Order 11357 which "directed that the provisions of the National Traffic and Motor Vehicle Safety Act of 1966, as amended (15 U.S.C. 1381 *et seq.*) be carried out through the National Highway Safety Bureau."

In view of this action by the Secretary of Transportation shortly before the Government filed its brief in this case, the Government's effort to demonstrate the "propriety" of the "administrative scheme" under which the Federal Highway Administrator, not the National Highway Safety Bureau, issued Safety Standard No. 202, is difficult to fathom. It is possible that the Department of Justice was unaware of the Secretary's August 10, 1968 amendment to the regulations of the Department of Transportation, which would explain the Government's failure to make any reference to the Secretary's action in its brief. In any event, it stands as a clear refutation of the argument made by the Government and demonstrates that Petitioners were entirely correct in their contention that the Respondents unlawfully by-passed the Respondent Dr. Haddon and his Bureau in establishing Safety Standard No. 202.

II. THE PROCEDURES FOLLOWED BY RESPONDENTS IN ESTABLISHING SAFETY STANDARD NO. 202 WERE DEFECTIVE WHETHER SUCH STANDARDS ARE RULES OR ORDERS.

The Government's Brief proceeds on the assumption that if Motor Vehicle Safety Standard No. 202 can be classified as a "rule" rather than an "order", the procedures for its establishment need not require any more than that some person in the Department of Transportation issue a notice of proposed rule-making giving interested persons an opportunity to submit written data, views or arguments, and that some person in the Department of Transportation thereafter publish the standard in the Federal Register. For the reasons set forth in the Petitioners' Brief, we do not believe that Federal safety standards can be established by "rule" because, among other things, the Act expressly provides that they shall be established by "order". (Petitioners' Brief 11-16) The Government prefers to place its reliance on a very ambiguous legislative history rather than on the unambiguous language of the Act, but with all due deference to its views, this is not the appropriate method for interpreting statutory requirements.

In any event, the Government misreads the cases, and particularly this Court's decision in *American Airlines, Inc. v. C.A.B.*, 123 U. S. App. D. C. 310, 359 F.2d 624 (1966), cert. denied 385 U. S. 843, in suggesting that the procedures followed in this case would suffice if only we classify safety standards as "rules" rather than "orders". The Administrative Procedure Act was designed to enlarge the protection of the public against arbitrary administrative action and expressly provides that none of its provisions should be held to diminish the constitutional rights of any person "or to limit or repeal additional requirements imposed by statute or otherwise recognized by law." (Section 12 of the Administrative Procedure Act, 5 U.S.C. § 559) This provision was included in the Act to make it clear that its provisions would be interpreted as "supplementing constitutional and legal requirements imposed by existing law." Attorney General's Manual on the Administrative Procedure Act, p. 139. The Supreme Court has on more than one occasion insisted upon an "hospitable" reading of the APA and rejected Government arguments for a restrictive interpretation of its protections. See e.g. *Shaughnessy v. Pedreiro*, 349 U. S. 48 (1955).

The decision of this court in the *American Airlines* case is not at odds with this view and does not support the Government's position. While upholding the action of the CAB under that agency's broad rule-making authority, the majority opinion of the Court points out that: "This court has indicated its readiness to lay down procedural requirements deemed inherent in the very concept of fair hearing for certain classes of cases, even though no such requirements had been specified by Congress." It notes that the CAB did not limit itself to "minimum procedures" and refers to the "underlying findings and conclusions" expressed by the Board in support of its action. It recognizes that there may be wisdom in providing for oral testimony "in the advance of the adoption of controversial regulations governing competitive practices, even though the need for development of overall requirements precluded Congressional requirement of such hearings for rule making generally." It quotes with apparent approval from the Final Report of the Attorney General's Committee on Administrative Procedure (S. Doc. 8, 77th Cong., 1st Sess. 1941) the following passage:

> "[Hearings] are now generally held in connection with the fixing of prices and wages, the prescription of rules for the construction of vessels and other instruments of transportation, the regulation of the ingredients and physical properties of food, the prescription of commodity standards, and the regulation of competitive practices. The regulation of all of these matters bears upon economic enterprise and touches directly the financial aspects of great numbers of businesses affected, either by imposing direct costs or by limiting opportunities for gain. Appreciation of these effects, both by businessmen and government officials, seems to be the chief cause of the increased use of hearings in administrative rule making.
>
> The Committee believes that the practice of holding public hearings in the formulation of rules of the character mentioned above should be continued and established as standard administrative practice, to be extended as circumstances warrant into new areas

> of rule making. The difficulty of defining necessary exemptions from any general prescription argues strongly, however, against the wisdom or feasibility of a statutory requirement that hearings invariably precede promulgation of regulation. * * * Here, as elsewhere in the administrative process, ultimate reliance must be upon administrative good faith – good faith in not dispensing with hearings when controversial additions to or changes in rules are contemplated."

These comments in the *American Airlines* opinion hardly support the Government's narrow interpretation of the scope and intent of the Administrative Procedure Act.[2]

In this case, one thing that is clear both from the terms of the National Traffic & Motor Vehicle Safety Act *and* its legislative history is that the agency must maintain a record of the evidence and comments on which it bases its standards and must make findings in support of such standards which have substantial evidentiary support in the record considered as a whole[3]. (Petitioners' Brief pp. 16-20. See also, Petitioners' Brief pp. 31-35) For the reasons explained in

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[2] See also, Sen. Doc. No. 248, 79th Cong., 2d. Sess., Legislative History of the Administrative Procedure Act 259 (1946), which states that in proceeding under section 4 of the APA: "Matters of great impact, or those where the public submission of facts will be either useful to the agency or a protection to the public, should naturally be accorded more elaborate procedures." See also *Philadelphia Co. v. SEC,* 84 U. S. App. D. C. 73, 175 F.2d 808 (1948), vacated as moot, 337 U. S. 901; *Jordan v. American Eagle Fire Ins. Co.,* 83 U. S. App. D. C. 192, 169 F.2d 281 (1948); Davis, Administrative Law Treatise §§ 6.06, 7.02, 7.06, 15.03 (1958).

[3] S. Rep. No. 1301, 89th Cong., 2d Sess. p. 8 states:

> "Any person who believes himself to be adversely affected by the promulgation of a standard may obtain judicial review, in accordance with section 10 of the Administrative Procedure Act (sec. 105). The Administrative Procedure Act sets forth the long-established criteria for judicial review of agency action and provides that agency findings shall be upheld if supported by substantial evidence on the record considered as a whole. That act also authorizes the reviewing court to stay the agency action pending review to the extent necessary to prevent irreparable injury."

(Continued)

Petitioners' Brief, we believe that this requirement strongly supports the view that standards were to be issued under adjudicatory type procedures. The point to be made here, however, is that the requirement still exists and cannot be disregarded whether the standard is called a "rule" or an "order".

The only attempt the Government makes to answer this argument is to claim that section 4 of the APA is applicable to this proceeding apparently on the assumption that if such is the case, any procedural requirements not found within the literal words of section 4 of the APA can be ignored. The primary deficiency in this reasoning is that it requires the Court to disregard both the terms of the National Traffic and Motor Vehicle Safety Act and its legislative history. In addition, it requires a constrction of section 4 of the APA as a limitation on "additional requirements imposed by statute or otherwise recognized by law," which is in direct contradiction to the explicit rule of construction set forth in section 12 of the APA, *supra.* Finally, it requires an interpretation of section 4 of the APA which would raise substantial due process questions under such cases as *Morgan v. U. S.*, 298 U. S. 468 (1936); *Morgan v. U. S.*, 304 U. S. 1 (1938), and *SEC v. Chenery Corp.*, 318 U. S. 80 (1943). (See Petitioners' Brief pp. 29-30)

In the *American Airlines* case, the Court pointed out that the petitioners were confronting the Court "solely with a broad conceptual demand for an adjudicatory-type proceeding . . . ." In this case, it is the Government which is confronting the Court "solely with a broad conceptual demand" albeit for a rule making type proceeding. Nowhere in the Government's brief is there any attempt to

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[3] (Continued)
H. Rep. No. 1776, 89th Cong., 2d Sess. p. 21 states:

> "The other change from the introduced bill is the committee revision of paragraph (3) of subsection (a) to provide that the court shall have jurisdiction to review an order in accordance with section 10 of the Administrative Procedure Act and to grant relief as provided therein. This inclusion means (1) that a reviewing court will consider the entire record before it and (2) that the findings of the Secretary will be sustained when supported by substantial evidence on the basis of the entire record."

harmonize the provisions of the National Traffic & Motor Vehicle Safety Act and the Administrative Procedure Act and the statements in the House and Senate Committee reports. The Government's approach is simply to gloss over not only inconsistencies, but the clearest expressions of legislative intent and offer up as a solution to every problem section 4 of the APA in its most sterile form.

For the reasons explained in Petitioners' Brief, this is not what the cases allow, it is not what the law provides, it is not what the Congress intended and it is not what the agency initially provided. Whether Federal motor vehicle safety standards are "orders", as Petitioners contend, or "rules" as the Government contends, the proceedings leading to the establishment of Federal Motor Vehicle Safety Standard No. 202 were deficient under controlling judicial precedents, under the terms of the relevant statutes, and under established concepts of fair administrative process.

III. RESPONDENTS HAVE NOT SHOWN COMPLIANCE WITH THE CRITERIA SPECIFIED IN THE ACT IN ESTABLISHING SAFETY STANDARD NO. 202.

The Government devotes a substantial portion of its brief to a discussion of the reasonableness of Federal Motor Vehicle Safety Standard No. 202. This discussion gives us the views of the Department of Justice and may or may not represent the views of the Department of Transportation which did not make any findings in support of its order. For the reasons explained in Petitioners' Brief, the "*post hoc* rationalizations" offered by the Department of Justice cannot fill this gap in the agency's deliberations. The "elementary" principle applicable in such circumstances is not that stated in the Government's Brief (p. 31), but rather that stated by the Supreme Court when it said that it is "a simple but fundamental rule of administrative law . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those

grounds are inadequate or improper, the court is powerless to affirm the administrative action." *SEC v. Chenery Corp.*, 332 U. S. 194, 196 (1947) (See Petitioners' Brief pp. 31-35)

The "rationalizations" offered by the Department of Justice do serve, however, to emphasize the need for requiring Respondents to carry out their responsibilities within the framework mandated by law. As explained in Petitioners' Brief (pp. 35-40), the provisions of the National Traffic and Motor Vehicle Safety Act with regard to the establishment of standards, such as the provision that standards be "reasonable, practicable and appropriate," require that standards be based on the following criteria:

(1) They must protect the public against "unreasonable" risk of death or injury;

(2) They must reflect consideration of "relevant available motor vehicle safety data, including the results of research, development, testing and evaluation activities" conducted pursuant to the Act;

(3) They must reflect consideration of such factors as whether a standard is "likely to stifle innovation," "reasonableness of cost," "feasibility," "lead time," and the "desireability of giving consumers wide range of choice in the selection of motor vehicles";

(4) They must assure that "vigorous competition in the development and marketing of safety improvements" will be maintained;

(5) They must assure that "manufacturers and parts suppliers will . . . be free to compete in developing and selecting devices and structures that can meet or surpass the performance standards."

In the course of the administrative proceedings in this case, Petitioners and other interested parties pointed out that these criteria would not be satisifed by a standard requiring head restraints to be factory installed by new car manufacturers.

(Petitioners' Brief pp. 5-8, 35-40). They pointed out that such an order would deny safety benefits to all but owners of new passenger cars manufactured after January 1, 1969, that such an order would delay the benefits to the public of this safety advance, that such an order would curb competition in the automotive industry, stifle innovation, increase costs, restrict consumer choice, and preclude independent manufacturers and parts suppliers from serving a portion of a market they had developed and had been serving for years. They urged Respondents to consider and weigh these facts in establishing a standard for "head restraints" and not to act on the basis of "conjecture and assumptions."

Nowhere in the order establishing Federal Motor Vehicle Safety Standard No. 202 is there any indication that Respondents acted on the basis of the criteria provided by the Congress. Nowhere in the course of this administrative proceeding is there any indication that Respondents considered "reasonableness of cost" or the preservation of "consumer choice" or the promotion of "vigorous competition in the development and marketing of safety improvements." It is not likely that such factors upon analysis would have produced an order for a safety accessory requiring new car manufacturers to factory install head restraints in whatever cars they make next year. But where is there any such analysis in this proceeding? It is not to be found anywhere in the voluminous transcript of the proceedings filed by the Respondents with the Court or even in the Government's Brief.

A significant comparison can be made between the kind of justification given by the Department of Justice for the order in this proceeding and the Report on "Safety for Motor Vehicles in Use" made by Respondents under section 108(b)(1) of the National Traffic and Motor Vehicle Safety Act (15 U.S.C. §1397(b)(1)) shortly after the filing of Petitioners' Brief. This Report analyzes at length the need for "safety priorities," reviews in detail the "available data" including the results of research and evaluation activities conducted pursuant to the Act, gives full consideration to "cost" and other "economic" considerations, and reveals considerable awareness of the possible impact of Respondents' establishment of standards for "vehicles

in use" on the automotive aftermarket. For example, it states that the selection of candidates for coverage under such standards "involves trade-offs between the safety priority of each candidate item and its economic implications both in inspection and repair costs." (Rep't p. 30) It cautions that "any requirement for retrofit or add-on must be carefully considered since it will have the effect of imposing an economic burden particularly on low-income groups who usually drive older cars." (Rep't pp. 35-62) It devotes an entire chapter to "The Consumer Interest." (Rep't pp. 69-81) And it raises many relevant questions with regard to the potential effects of safety standards on parts manufacturers, retailers and wholesalers, and other segments of the automotive industry. (Rep't pp. 95-101) Among the questions set forth in the Report are whether used car standards will affect "replacement" practices, will encourage more people to buy used rather than new cars, will affect the sale of new vehicles, place a "greater emphasis on designed-in safety features," increase "the costs of engineering manufacturing and quality control," increase the "sales volume of replacement parts, retrofit kits, or modifications," render existing "inventories of manufactured parts unmarketable," "stimulate proliferation of new products," reduce the "variety of grades and quality," increase the "demand for preventive and corrective maintenance and repair services and parts," increase "labor costs," and require "special provisions for inspecting customized vehicles." (Rep't pp. 96-99)

The contrast between the kind of analysis which Respondents offered in their Report on "Safety for Motor Vehicles in Use" and the lack of any such analysis in the proceedings in this case is evident. It is highly significant because it reveals the range of considerations and alternatives available in achieving the safety objectives of the National Traffic and Motor Vehicle Safety Act. It is directly relevant because, as the Report recognizes, used car standards must be established on the basis of the same criteria which were set forth in the Act for all motor vehicle standards, including Standard No. 202. (Rep't p. x)

CONCLUSION

Petitioners will not deal with any other points in the Government's Brief since they are sufficiently covered in Petitioners' principal brief. On the basis of premises, it is submitted that the order establishing Federal Motor Vehicle Safety Standard No. 202 is null and void and should be set aside by the Court.

MILTON EISENBERG

1700 K Street, N. W.
Washington, D. C.

Attorney for Petitioners

Of Counsel:

STRASSER, SPIEGELBERG, FRIED,
FRANK & KAMPELMAN

James B. Blinkoff